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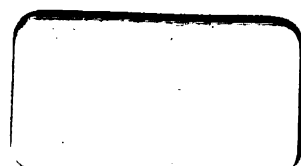
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A TREATISE  
OF THE  
LAW OF WATERS;

INCLUDING THE  
LAW RELATING TO RIGHTS IN THE SEA,  
AND RIGHTS CONCERNING  
RIVERS, CANALS, DOCK COMPANIES,  
FISHERIES, MILLS, WATERCOURSES, ETC.,

WITH A NOTE  
CONCERNING THE RIGHTS OF THE CROWN  
TO  
THE LAND BETWEEN HIGH AND LOW WATER MARK.

---

BY HUMPHREY W. WOOLRYCH,  
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

AUTHOR OF "THE LAW OF RIGHTS OF COMMON," "THE LAW OF WAYS,"  
"THE LAW OF SEWERS," "THE LAW OF LIGHTS," ETC.

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FIRST AMERICAN, FROM THE SECOND LONDON EDITION.

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1858.



DP  
AWY  
HBW



## P R E F A C E.

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THE numerous cases decided upon the matters of this Treatise, have suggested the propriety of a new Edition.

The Law of Sewers has been withdrawn, because in consequence of modern alterations, sufficient materials have been found to make a separate Work of that subject.

The increasing interest which appears to exist concerning the Rights of the Crown to the land between high and low water mark, has induced the Author to add a Reading or Note with reference to that important question.

In the first Chapter the various rights of water are enumerated.

Certain rights which may be enjoyed in the sea independently of commerce (the latter subject not forming any part of our inquiry), and those also which may be had in rivers, are mentioned in the second and third Chapters : we then proceed, in the fourth Chapter, to speak of Canals, Docks, and Waterworks. The next is devoted to the subject of Fisheries; and sixthly, we shall say something of Water-mills; for although a mill is not of course a right enjoyed in water, it is yet too nearly connected with the ownership of streams and rivers, to be omitted in this Treatise. The seventh Chapter is on watercourses, which, strictly taken, mean private rights of water.

These Chapters include the different privileges or ownerships in water.

We now come to speak of the incidents which belong to them. The eighth Chapter, therefore treats of the user of these rights, whether they be of navigation, of fisheries, of watercourses, or of any other such property. In the ninth, the important subject of Obstructions is discussed, together with the various remedies which are open to the King's subjects

for the redress of any grievances happening by reason of such obstructions or injuries. The doctrine of extinguishment is explained in the tenth Chapter; and in the eleventh, several incidental matters, as the liability of these rights to pay tithes, to be rated, to be the subjects of a settlement, is fully spoken of. We then proceed to the consideration of Pleading, Evidence and Costs, and thus conclude the Work.

*2, Hare Court, Temple,*  
*June, 1851.*



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# A TREATISE,

&c. &c.

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## CHAPTER I.

### OF THE VARIOUS RIGHTS OF WATER.

A RIGHT to use water may be either public or private. From some privileges of this kind none can be excluded; they are the common birth-right of her Majesty's subjects; but others are capable of being reduced into individual possession, and these are incorporeal hereditaments.'

The Chapter now before the reader will contain a mere summary of the rights which may be thus exercised by the public, or by private persons. In subsequent pages, each privilege will be discussed upon its own merits.

But prior to our entering upon the proposed list, it is desirable to mention, that the law of navigation does not belong to the subject of this Work; to say more upon that point than that the "sea is the great highway of the world," and that public navigable rivers are considered in law as "highways," would be invading the province of writers on the Commercial Law. Incidental considerations, such as the right to demand toll under certain circumstances, the making of ports and harbours, with others of a similar nature, will be occasionally touched upon, to illustrate individual rights upon these public waters; but, as a general principle, it must be laid down, that a right of passage over the sea and great rivers is free, common, and universal.

Those important advantages, public rights of fishery, or, to speak more technically, public fisheries, deserve a very particular notice. Fisheries are either enjoyed in common with others, or they are confined to the exclusive enjoyment of an individual. \*As a general doctrine, [\*2] fisheries in the sea and in public navigable rivers are open to all; but we shall find that particular rights may be successfully maintained

even in these ordinarily public waters, by prescription, or by royal grant, beyond time of memory.

In rivers not navigable the fishing is usually a private right; but custom will vary the general rule. If, therefore, the public should be found upon any occasion to claim a right of piscary in rivers, which, *prima facie*, would be considered as private by the law, we must attribute the unusual privilege to the force of custom, which militates against common right, or the every-day usages of things. A private man may, consequently, be entitled to fish in streams which are in their nature public, while the people at large may by chance be discovered in possession of a river which the owner of the soil may, from time immemorial, have neglected, or which he may have dedicated to them.

Another valuable enjoyment of water is the privilege of bathing. This may exist by custom or prescription; but it has been decided that there is no common law right of bathing in the sea,<sup>(a)</sup> and, by inference, there can be none such in a river.

If, however, the inhabitants of a particular vill or place, or a certain class of individuals, have from time immemorial participated in the enjoyment of an easement of this kind, it may well be questioned how far such a right can be disturbed, either by the building of houses contiguous to the spot, by claims of ownership of the soil, or any other circumstances. For objections which may be very successfully raised in derogation of a common law right to bathe will be deprived, for the most part, of their influence, when weighed against the important consideration of custom or prescription.

The same observations which have been made regarding these rights at sea are also applicable to navigable rivers. There exist the same rights of passage, and of fishing, and the restriction as to bathing is confined within the same limit. And by prescription, a watercourse (an easement, concerning which much will hereafter be said) may be claimed in public rivers.

In rivers, however, which are not navigable, and which may be said to be private, because the soil belongs most commonly to an individual, other rights prevail. There may be at least three kinds of fisheries in such a river, namely, a fishery enjoyed by the owner himself, as the territorial possessor; a right of \*fishery granted to him by another [\*8] person; and a right enjoyed in common with others, either by virtue of a grant or by prescription.

That very important easement, a watercourse, is inseparable from the consideration of private rivers. We shall explain by and by, more fully than in this place, in a Chapter devoted to the subject, that the possessor

(a) 5 B. & A. 268, *Blundell v. Catterall*.



of such a right cannot use it to the detriment of his neighbour, any more than that he, in turn, can be molested with impunity in the exercise of his own lawful user. Questions upon the use or misappropriation of these waters must frequently arise between the owners of mills, who occasionally interfere with each other's respective rights, either by taking too much water from the original channel, or throwing back too great a quantity upon the machinery of another mill by penning it improperly back.

Inhabitants, or particular persons residing in certain vills, may also have a right to water their cattle in rivers at spots where they had an immemorial usage to do so; and there may be other customs and prescriptions to use water in various ways, which are, of course, too numerous and diversified to be contained in a general Treatise.

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## \*CHAPTER II.

[ \*4 ]

OF RIGHTS IN THE SEA; THE OWNERSHIP OF THE SOIL THEREIN,  
TOGETHER WITH THE RIGHTS OF ALLUVION, ETC.

THAT the King's subjects have a right to use the ocean for the purposes of commerce; that upon paying certain duties for the use of ports and harbours, they become entitled to the shelter and conveniences of those works; that the sea, in a word, is open and common to all for the accomplishment of lawful and useful undertakings, is so familiar to every one, as to need no further confirmation nor authority. The right of fishery, already alluded to in the preceding Chapter, is a very important privilege, and we shall devote a considerable space to the careful investigation of that subject in a future part of these pages.<sup>(a)</sup> There is, however, no common law right to bathe in the sea, as we shall presently take occasion to shew.

Other matters which will form the subject of this Chapter, are the right of taking wrecked goods, by which we assume the absence of any owner—the property of the soil of the sea itself, and of the sea shore, concerning which some questions have arisen—rights of alluvion—the ownership of ground left derelict by the sea—and of islands arising therein. Upon these latter topics much discussion has occasionally prevailed, and we shall lay the cases before the reader in the course of this inquiry.

Prior, however, to the consideration of these several heads, a general outline of the extent of our seas, in which the rights above referred to are exercised, may not be inapplicable here.

(a) Chap. V.

The words "infra quatuor maria" are said to mean, within the kingdom of England, and the dominions of the same kingdom.(b) The four seas are—1. The Atlantic, which washes the western shore of Ireland, and which comprises, as it were by way of sub-division, the Irish Sea, or St. George's Channel, and the Scottish Sea to the north west; 2. The North Sea on the coast of Scotland; 3. The German Ocean on the east; and \*4. The British Channel on the south.(c) The jurisdiction [ \*5 ] of the King, as lord and sovereign of the sea, has been defined, with respect to the Channel, to extend between Britain and France, and to the middle of the sea between Britain and Spain.(d) With respect to the Western and Northern Oceans, greater difficulty has arisen in determining the limits of British dominion, and the point does not seem to be entirely set at rest. The great Selden has contended for the fullest exercise of dominion over the seas of Britain, both as to the passage through, and fishing in them; while Sir Philip Medows contents himself with suggesting more confined rights—as, to exclude all foreign ships of war from passing upon any of the seas of England without special license, to have the sole marine jurisdiction within those seas, and also an appropriate fishery.(e)

And Rolle, C. J., observes in his Abridgment, that Selden told him of a record in the Tower of London (84 E. 1), where it appeared that all the princes in Christendom had agreed, that the narrow seas, and the sea round England, were within the jurisdiction of the King of England.(f)

According to Bodinus, by a kind of common right enjoyed by all princes of maritime countries, the particular sovereign may command and control those who approach within thirty leagues of his shore, and may lay impositions upon them.(g) As our business here, however, is with matters of a practical nature, and not merely theoretical, among which this supposed dominion certainly ranges, we will pass on, merely referring to some of the principal writers on that point.(h)

The subject above mentioned is the *jus maris*; the next branch of jurisdiction exercised on the ocean is the municipal right. On this point, Lord Hale observes, that that arm, or branch of the sea, which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner. That part which lies without, is called the main sea or ocean.(i) So Coke, C. J., observed in a case [ \*6 ] which came before him, that the admiral\* should have no jurisdic-

(b) Co. Lit. 107.

(d) 3 Leon. 73; 5 Com. Dig. 102.

(f) 1 Ro. Ab. 528.

(g) De Republ. lib. 1, c. ult. p. 179, cited in Schultes, p. 4. 2 Molloy, 375, c. 16, s. 2.

(h) See Selden's *Mare Clausum*, lib. 1, c. 26. Observations concerning the dominion and sovereignty of the seas, by Sir Philip Medows, 1689. Justice's Sea Laws, Article 1, part 1.

(i) De Jure Maris, p. 10. 4 Inst. 140. 16 Vin. Ab. 575, B. (a) 7.

(c) Co. Litt. 107 (a), Note 7.

(e) Co. Litt. 260 (a), Note 1.

tion where a man may see from one side to the other; to which the other justices agreed. And, moreover, that where the place was covered over with salt water, and out of any county or town, where it is altum mare, or the high sea; but where it is within any county, it is not the high sea. And, therefore, a prohibition was granted in a case where a contract took place in the Thames, adjoining to St. Katharine's.(k)

Again, below the low water mark the admiral has the sole and absolute jurisdiction; between the high water mark and the low water mark, the common law and the admiral have *divisum imperium*, interchangeably, that is, the one upon the water, and the other upon the land.(l)

The admiralty jurisdiction, with reference to the trial of prisoners in England, has undergone much alteration. It was formerly governed in a great measure by 28 H. 8, c. 15, and 39 Geo. 3, c. 37.(m) But by 4 & 5 Wm. 4, c. 86, (The act for establishing the Central Criminal Court), s. 22, that Court is invested with power to try offences committed on the high seas, and other places within the jurisdiction of the admiralty of England, and to deliver the gaol of Newgate of persons committed for such offences.

The statute 7 Vict. c. 2, recognising the 28 H. 8, c. 15, and declaring the expediency of making provision for the trial of persons charged with offences on the high seas without the opening of a special commission, by s. 1, empowers justices of assize to take cognizance of all these offences within the limits of their respective commissions. And by sect. 3, justices are required to commit the offender to the gaol to which he would have been committed had the offence been committed on land. By sect. 2, the jurisdiction of the Central Criminal Court is not to be affected, nor shall the issue of any special commission be restrained, "if need shall be."

This very general view of the subject may serve for an introduction to the considerations which are about to be offered concerning the various rights which may be derived from the sea.

\*There is no common law right of bathing in the sea, although such an indulgence will meet with no interruption, provided that it [ \*7 ] be exercised with decency, and the rights of others be not thereby invaded. Such an user, however, of this privilege as violates the respect which is due to public morals, will be repressed, and punished by the law. And it may be very innocent to enjoy this right or easement in some places at certain times, and as unjustifiable to use it at other seasons. So again, it may be exercised guiltlessly on parts of the coast, under circumstances which may subsequently alter, so as to render it no longer a lawful recreation

(k) Ow. 122, Leigh v. Burley.

(l) 5 Rep. 107. Mo. 122, in Lacey's case. See 1 Keb. 14, Ball v. Blackmore 2 Ro. Rep. 157, Barnes's case. Habeas corpus; the prisoner was remanded.

(m) See Steph. 261.

upon those spots. This was the case of the individual who was indicted for bathing in the sea at Brighton, opposite the east cliff. Till within a few years previously to the change, there had been no houses near the spot, and, indeed, regiments of soldiers had been accustomed to bathe there. Afterwards, however, a row of houses was erected on the cliff, and any one might be clearly seen from thence as he undressed and swam in the sea. The defendant, on a Sunday in July, bathed from this spot, undressing and dressing himself upon the beach. It did not appear, however, that he had been guilty of any wanton indecency, or that he exposed his person further than was necessary for the purpose of bathing. It was contended, that he had not committed an indictable offence, that he had no criminal intention, his object being to procure health, and not to outrage decency, in fact, that the inhabitants of these houses had come to the nuisance, and could have no right to complain of it. It was urged that, if the building of a house within sight of a spot appropriated to public bathing rendered it indictable to bathe there without a machine, the poor would soon be debarred from bathing on the southern coast of the island. The easement in the River Thames was then mentioned, as well as the custom from time immemorial for the Westminster boys to bathe at Millbank. Lord Chief Baron Macdonald, who tried the indictment, expressed a strong opinion against the defendant, and he was accordingly found guilty; and when brought up for judgment, the Court of King's Bench declared their firm resolution that the offence was a misdemeanor, and that the conviction had been proper. Nevertheless, this being the first prosecution of the sort in modern times, they consented to his discharge, upon his entering into a recognizance to appear when called for, and receive sentence. (\*)

However, this easement must not only be conducted with decency, but it must also not invade the rights of any individual; for, as we before said, the public have no common law right of bathing in the sea, [ \*8 ] nor, as incident thereto, of crossing the sea \*shore on foot, or with bathing machines, for that purpose. This point was decided in the following case:—Trespass was brought for breaking and entering the plaintiff's close. The defendant pleaded, amongst other things, that all the King's subjects had been used and accustomed to enjoy the liberty of bathing in the sea from time to time at all seasonable times, &c. The plaintiff took issue, and newly assigned, and there was an issue thereon. Upon these pleas, and upon the new assignment, the plaintiff had a verdict, subject to the opinion of the Court on a special case. The plaintiff was lord of the manor of Great Crosby, which is bounded on the West by the river Mersey, an arm of the sea. He was the owner of the shore, as lord of the manor, and he had the exclusive right of fishing thereon with stake nets. The defendant was servant at an hotel erected in 1815 in Great Crosby, fronting the shore, and bounded by the high water mark of the Mersey. The proprietor kept bathing machines, which were driven by the defendant across the shore into the sea, for the purpose of bathing. Before the establishment

(\*) 2 Campb. 89, Rex v. Crunden.

of the hotel it had been customary for the public to cross the shore on foot, in order to bathe. There was a common highway for carriages along the shore, and various articles for market were occasionally carted across the shore. The defendant's claim was for a common law right for all the King's subjects to bathe on the sea shore, and to pass over it for that purpose, on foot, and with horses and carriages. There was a difference of opinion among the Court, Best, J., being in favour of the defendant's claim, and Holroyd, J., and Bayley, J., together with Abbott, C. J., holding that the plaintiff should recover. Judgment was accordingly given for the plaintiff by the resolution of three Judges against one. (o) The dissenting Judge, (Best, J.) put his argument on the broad grounds of the sea being the great highway of the world, of the importance of a free access to the sea, and of the necessity of a right to bathe in the sea, as essential to the health of so many persons. It was clear that persons had bathed in the sea from the earliest times, and that they had been accustomed to walk or ride on the sands. By bathing, those who live near the sea are taught their first duty, namely, to assist mariners in distress. They acquire by bathing confidence amidst the waves, and how to seize the proper moment for giving their assistance. The learned Judge observed, that attempts had been made to compel an acknowledgment from such as used machines to the lord of the manor, but that none by these attempts had succeeded. It had been at all times the policy of this country to encourage navigation. There is no statute or rule of common law, which secures the right of passage over the shore for purposes connected with navigation; and those who have passed \*over the shore for these purposes, have been trespassers, if they were not justified under the general common law [ \*9 ] right of free passage. The learned Judge then quoted the words of Bracton: (p) *Riparum etiam usus publicus est de jure gentium, sicut ipsius fluminis*. The banks of rivers are therefore as much open to the public as the rivers themselves. The shore of the sea is admitted to have been at one time the property of the King, and from the general nature of the property it never could be used for exclusive occupation. It was holden by the King, like the seas and highways, for all his subjects. (q)

HOLROYD, J. The plaintiff was owner of the soil of the sea shore, as lord of the manor, and he must have been so from the time of passing the statute quia emptores, since which time no manor can have been created, and being stated to have the exclusive right of fishery, he could only have it appendant or appurtenant to the manor. It must, therefore, have been by prescription, and consequently from time immemorial. It was to be remarked, that the usage as stated, was not founded on usage or custom, but upon the supposed general law only. "My opinion, therefore," said the learned Judge, "will not affect any right that has been, or can be gained by prescription or custom, either by

(o) 5 B. & A. 268, Blundell v. Catterall.

(p) Lib. 1, c. 12, s. 6.

(q) 5 B. & A. 274.

individuals, or by either the permanent or temporary inhabitants, of any vill, parish, or district. Bracton's opinion was copied from the civil law, which, as applicable to this matter, differs from the common law of England, and that opinion has never been adopted by the law." The learned Judge then mentioned the case of *Ball v. Herbert*,<sup>(r)</sup> concerning towing-paths, where it was held, that no right existed at common law to tow on the banks of navigable rivers. Certainly there is a right of passage for the purposes of navigation at common law, and also a common right of fishery, although even from the last the public may be excluded, though not now by charter, yet by immemorial custom and prescription. After quoting passages from Lord Hale and the Year Books, in corroboration of this position, the learned Judge said, that such a general public right in all the King's subjects, to use the sea shore for all such temporary purposes as they please, would be inconsistent with the nature of permanent private property. If there be anywhere a necessity, or common urgency for such a right, most probably usage and custom will support, regulate, limit, and modify it; for wherever there has been a necessity for it, then some usage must have prevailed. After citing some other passages from Lord Hale, which went [ \*10 ] to confirm exclusive privileges, or an \*exclusive right in the owner of the shore, the learned Judge concluded for the plaintiff.<sup>(s)</sup>

BAYLEY, J., was of opinion, that no common law right existed in favour of this claim. Every embankment by which land is redeemed from the sea would obstruct the exercise of the right, and so would the erection of holding stakes for nets, and yet such embankments and stakes are frequently set up. The practice of bathing may contribute to health, but it must be confined within reasonable limits, and it is by no means necessary that the right should be co-extensive with the whole shore of the sea, or that it should extend to places where the right of fishing with nets exists.<sup>(t)</sup>

ABBOTT, C. J. "There is no authority in favour of the affirmation of this question. But it has been said, that 'as the waters of the sea are of use to the public for all lawful purposes, there must be an equally universal right of access to them for all such purposes, over land like the present.' If so, the defendant must prevail, because, in general, bathing in the sea is a lawful purpose. But no port can be erected without the license or charter of the King, nor is there any general right to unload merchandize on the shore, so that the general proposition cannot be maintained. Public convenience (adverting to the particular case,) must always be considered with a regard to private property. Perhaps, property of this description may be of little value to its owner, but still, if the doctrine contended for by the defendant be admitted, that little can never be increased. For stake nets, or other implements of fishing, could not be placed there, nor could sand or stones be taken

(r) 3 T. R. 261.

(s) 5 B. & A. 288.

(t) Id. 304.

away, nor could a wharf or quay be made, nor could a proper title be made to those thousands of acres which, at different times, have been gained from the sea, and its arms by embankments, and converted to pasture or tillage. Such wharfs, quays, &c., and in-takes from the sea, are matters too of public as well as private benefit. With regard to the practice of modern times, it can be considered only as more or less cogent according to its extent and uniformity. It was said at the Bar, that in some places a compensation is made to the owner of the shore, but I do not rely on this assertion as a ground of judgment. In many places, doubtless, nothing is paid. In some parts, the King is the owner of the shore, and it is not probable that any obstruction would be interposed on his behalf to such a practice. Of private owners, some may not have thought it worth while to advance any claim or opposition; others may have had too much discretion\* to put their title to the soil to the hazard of a trial, by an unpopular claim of a matter of [ \*11 ] little value; others, and probably the greater part, may have derived or expected so much benefit from the increased value given to their own land above, by the erection of houses and the resort of company, that their own interest may have induced them to acquiesce in, and even to encourage the practice, as a matter indirectly profitable to themselves." The learned Chief Justice then proceeded to instance the cases of wastes and commons, over which people walk and ride in all directions for their health and recreation, and sometimes even in carriages, deviate from the public paths into those parts which may be so traversed with safety. "In the neighbourhood of some frequented watering places, this practice prevails to a great degree; yet no one ever thought that any right existed in favour of this enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil."

"Then, lastly, the defendant has said, that the right might be considered as confined to those instances wherein it could be exercised without actual prejudice to the owner of the shore, and subject to all matters of present use or future improvement. No instances of such a limited or qualified right can however be found. With respect to frivolous or vexatious actions by the owners of the soil, the law has imposed a suitable check to all such proceedings; but there can be no harm for an owner to maintain his own private right, and preserve the evidence of it."(u) Judgment was given for the plaintiff.(b)

We have given this case at great length, on account of its importance; but it cannot be deduced either from this, or the instance of bathing at Brighton above mentioned, that a custom or prescription would be of no avail under similar circumstances. On the contrary, and probably in the case of the Westminster boys, an easement immemorially enjoyed by a particular class of persons cannot be dispensed with. It is a good and valid custom. And so again, if there were an adverse possession of any part of the sea shore for twenty years, this would be evidence *prima facie*

(\*) 5 B. & A. 310.

(u) Id. 316.

of a grant from the lord of the manor, the owner of the soil, liable to be rebutted, however, by opposite testimony on his behalf.

Again, to trespass, the defendant pleaded that the close was the sea shore, and that all the subjects of the King had a right to enter and carry away the sea-weed left by the tide, &c. This <sup>\*</sup>was holden to be [ \*12 ] a bad plea, there being no common law right of that nature.(w)

A right of wreck is very intimately connected with a dominion over the sea, and it is *prima facie* vested in the Crown.(x) It is said to be a royal perquisite.(y) But let us first examine what shall be said to come under the description of wreck. It is declared by Westm. 1, c. 4,(z) as follows: Concerning wrecks of the sea, it is agreed, that where a man, or dog, or cat, escape quick out of the ship, that such ship nor barge, nor any thing within them, shall be adjudged wreck; but the goods shall be saved and kept by view of the sheriff, coroner, or the King's bailiff, and delivered into the hands of such as are of the Crown, where the goods were found; so that if any sue for those goods, and after prove that they were his, or perished in his keeping, within a year and a day, they shall be restored to him without delay; and if not, they shall remain to the King, and be seized by the sheriff, coroners, and bailiffs, and shall be delivered to them of the town, which shall answer before the justices of the wreck belonging to the King. And where wreck belongeth to another than to the King, he shall have it in like manner. And he that otherwise doth, and shall thereof be attainted, shall be awarded to prison, and make fine at the King's will, and shall yield damages also. And if a bailiff do it, and it be disallowed by the lord and the lord will not pretend any title thereunto, the bailiff shall answer, if he have whereof; and if he have not whereof, the lord shall deliver his bailiff's body to the King.

This statute, however, is but declaratory of the common law, and with regard to the kind of animals, these three instances are only put for example, since all other beasts, fowls, &c., are understood, whereby the ownership or property may be known.(a) And Bracton, after stating the law above related, declares, that if sure marks have been set upon merchandizes and other things, there cannot be said to have been a wreck.(b)

Moreover, the author of the Mirror, who wrote after the passing of the act,(b) speaks of a man, beast, bird, or other living thing, and so includes more than is found in the act.(c)

[ \*13 ] <sup>\*</sup>Further, in order to constitute wreck, not only must there be no life saved, or vestige remaining by which the property may be identified, but the goods must be cast or left on the land by the sea,(d) touching the ground,(e) and this is the legal signification of the

(w) 1 Alc. & N. 348, Howe v. Stowell.

(x) Hale de Jure Maris, 140. 5 B. & A. 293. Or the grantee of the Crown, or in some person by prescription. By Holroyd, J.

(y) Dav. Rep. 56, (b).

(z) 3 Ed. 1.

(a) 2 Inst. 167.

(b) Lib. 3, C. s. 5, fol. 120.

(c) C. 1, § 13, c. 3.

(d) 11 H. 4. 16. 5 Rep. Vaugh. 168.

(e) 3 Hagg. 270. R. v. Forty-nine Casks of Brandy. For if they have not touched



word "wreck."<sup>(f)</sup> The jurisdiction over such property belongs therefore, not to the admiral, but to the common law.<sup>(g)</sup> It is said, that if a ship be ready to perish, and all those therein leave the ship in order to save their lives, and, then the forsaken ship perish, if any of the men be saved, and come to land, the goods shall not be lost.<sup>(h)</sup> So if a ship be pursued by enemies, and be forsaken by her sailors, upon which the enemy takes the ship, and despoils her of her goods and tackle, and turns her out to sea, and then if she be cast on land by stress of weather, where her men have arrived, the ship is not a wreck. It was so resolved by all the Judges.<sup>(i)</sup> Next, it is to be observed, that this statute of Westminster not only embraces wreck, but flotsam,<sup>(k)</sup> jetsam,<sup>(l)</sup> and ligan,<sup>(m)</sup> also.

W. de Newport brought replevin against Sir H. Nevil for three lasts of herrings; the defendant said, that he was lord of the manor, and prescribed to have wreck, and that the herrings were wreck. The plaintiff said, that they were in the keep of his mariners which arrived by the sea, and that the defendant took them out of their custody; and the defendant answered, that he took them as wreck out of all custody. The Court determined, that if the ship perish, and yet if any of the servants escape, the goods are not wreck.<sup>(n)</sup>

Flotsam, jetsam, and ligan, being on the land, pass by the grant of wreck, but this is only when the ship perishes, or the owner of the goods is not known; and goods cast into the sea \*for fear of tempest, [\*14] are not forfeited.<sup>(o)</sup> And so long as flotsam, &c., are upon the sea, they do not pass to the King, but to the first finder, and so it is of treasure trove.<sup>(p)</sup> And thus it was held, that, where Lord Berkeley had a manor adjoining to the Severn, where he prescribed to have wreck, and certain goods floated between high and low water mark, and the city of Bristol had flotsam there, the said goods were not a wreck as long as they floated in that manner.<sup>(q)</sup> And these liberties may be parcel of, or belonging to a hundred.<sup>(r)</sup> Flotsam, &c., were, however, the property of the King at common law.<sup>(s)</sup>

they are droits. If they have touched, and then moved again. Quære, S. C. See also Id. 299. R. v. Two Casks of Tallow.

(f) 2 Inst. 167. (g) Ibid. F. N. B. 112 (C.)

(h) 2 Inst. 167. Wreck of the King's goods will not alter the property in them. Plowd. 243. And he is not confined to his proof within a year and a day, like a subject. 2 Inst. 168, citing 35 H. 6, 27 Bro. Wreake de Meare, pl. 2, cites S. C.

(i) 2 Inst. 167, citing Fishlake's case, 5 R. 2.

(k) When a ship is sunk, or otherwise perishes, and the goods float on the sea. 5 Rep. 106.

(l) When the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards notwithstanding the ship perishes. Ibid.

(m) Or ligan—when such goods cast into the sea, are so heavy that they sink to the bottom, and the mariners, in order to have them again, tie a buoy, or cork, &c. to them. Ibid.

(n) 5 Ed. 3, 3.

(o) 46 E. 3, 15.

(p) 5 Rep. 108. Hale de Jure Maris, p. 41, and see 9 E. 4, 22,

(q) 5 Rep. 107.

(r) Hale, p. 42.

(s) 5 Rep. 108.

Having shewn what wreck is, we proceed to mention the ownership of it more particularly. Originally all wrecks were in the Crown,<sup>(t)</sup> and the King had always a right of way over any man's ground for his wreck, and so also his grantee.<sup>(u)</sup> Lord Coke observes, that there were two reasons for this, founded upon the common law: 1, because the property of all goods must be in some person; 2, that such goods belong to the King by virtue of his prerogative; the same with treasure trove, estrays, and other things.<sup>(v)</sup> Wreck, nevertheless, may be the subject's property by custom, charter, grant, or prescription;<sup>(w)</sup> for custom will give the subject a right against the King's prerogative.<sup>(x)</sup> It seems it cannot be claimed as parcel of a hundred. This point was admitted by the defendant's counsel, but he said he claimed by prescription, namely, that all the lords of the hundred had been used to have wreck within the hundred.<sup>(y)</sup> So the Lord High Admiral may have wreck by prescription, though it will not pass as appurtenant to his office.<sup>(z)</sup> In trespass for taking goods, the defendant claimed under the Lord High Admiral, but it appearing that the wreck belonged to the grantor's manor under whom the plaintiff made title, Holt, C. J., overruled the defendant's claim, and held, that wreck could not pass as appurtenant to the office. A bill of exception [ \*15 ] was then tendered, and sealed, and a writ of error brought. And Holt, C. J., \*said, that he had no doubt but that some wreck might belong to the admiral by prescription, as that about the Cinque Ports, and such places where he was most conversant in ancient time. But the judgment was affirmed.<sup>(a)</sup> The right to wreck of the sea, says Sir Matthew Hale, or to royal fish *infra manerium*, by prescription, is a strong presumption that the shores are parcel of the manor.<sup>(b)</sup> So one may have flotsam and jetsam by the King's grant, and may have flotsam within high and low water mark. And those of the west country prescribe to have wreck in the sea so far as they can see a Humber barrel.<sup>(c)</sup> But no grant of wreck will avail unless it be clearly proved to have issued legitimately from the Crown. As where there was a lease for years, unexpired, of wreck; but instead of reciting this lease in a feoffment, the party concerned got from the Crown a conveyance of an immediate estate in fee, and took no notice of the lease. The king was thus deceived, and the Court held the grant void. It could not, indeed, be properly carried out, and on that ground also it was of no value.<sup>(d)</sup>

(t) 6 Mod. 149, Anon. Vaugh. 164.

(u) 6 Mod. 149.

(v) 2 Inst. 167.

(w) Mayn. 14 E. 2, 435. 11 H. 4, 16. 9 E. 4, 22. Bro. Wreck. 5 Rep. 107. Wreck of the sea; see also 4 E. 4, 5; and the Index in Year-books, tit. Wreck.

(x) See 2 Inst. 168. Plowd. Case of Mines. Hale de Jure Maris, p. 41.

(y) 11 H. 4, 16.

(z) Although it is said, that a grant of wreck to a man in all his lands should not extend to lands of which he was disseised at the time, and in which, consequently, he had a mere right. Plowd. 130.

(a) 12 Mod. 259, Wiggan v. Branthwait. S. C. Holt, 758. S. C. 1 Ld. Raym. 473. See also 3 Leon. 73. The Queen and Sir John Constable's case. An officer, called a Sea Reeve, usually takes care of these rights for the lord of the manor, and collects the wreck accordingly. See Tom. Dict. tit. Sea Reeve.

(b) De Jure Maris, 27. 5 Rep. 107.

(c) 5 Rep. 107.

(d) 2 M. & P. 625, Alcock v. Cooke. See also 8 Rep. 56, 57.

Wreck granted by the King as appendant becomes extinct, if the appendancy should be destroyed.<sup>(e)</sup>

The goods, thus considered wreck by being cast upon the land, are called derelict, or deserted by the owners; and this happens upon many occasions, as where they come from infected towns or places; and though never purposed for merchandize, they will be wreck, when they come on shore.<sup>(f)</sup> And so again, *if never intended for merchandize*, goods which are thrown overboard to lighten a ship in a storm, are wreck, if cast on shore, although there be no subsequent shipwreck.<sup>(g)</sup> But goods (such as are intended for the purposes of traffic), which are cast overboard to lighten a ship, are not esteemed derelict; which question, says L. C. J. Vaughan, has not been thoroughly examined.<sup>(h)</sup> Boats, or other vessels forsaken, or found on the sea without any person in them, are also said to be derelict. Of these the Admiralty has but the custody, and the owner may recover them within a year and a day.<sup>(i)</sup>

\*Wreck, however, does not alter the property where such [ \*16 ] goods belong to the King.<sup>(k)</sup>

By 8 & 4 Wm. 4, c. 52, s. 50, all foreign goods, derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom, &c., shall at all times be subject to the same duties as goods of the like kind imported into the United Kingdom respectively are subject to. This term "wreck," in the statute applies to goods thrown on shore by the violence of the waves. There was a collision during a storm between two ships: one of them containing tobacco was for some hours deserted by her crew, and when again taken possession of was on shore and full of water. The tobacco was damaged, and taken out in order to lighten the ship, which was then got off, and sold for one-third of her previous value. The Court held that these goods were not wreck within the statute above mentioned, and that the ship was not wrecked.<sup>(l)</sup>

It is said, that the possession of the wreck is in him that has such right before any seizure.<sup>(m)</sup> This, of course, means the property; and as the Crown is the original owner, this anticipation of the possession is grounded upon the same principle as in the case of royal fish. So Fitzherbert lays it down, that if a man have a wreck by prescription, or the King's grant, and goods be wrecked, if on his land, he may have an action of trespass against any one for taking them away.<sup>(n)</sup> And trespass may likewise be maintained before seizure by the lord, because the right is in the lord, and there is a constructive possession in respect of

(e) 9 Rep. 25.

(f) Vaugh. 168.

(g) Ibid.

(h) Ibid.

(i) 1 Rob. Rep. 41, citing life of Sir L. Jenkins, vol. 1, p. 89.

(k) Plowd. 243.

(l) 1 C. B. 92, Legge v. Boyd. 14 L. J., C. P. 138.

(m) 6 Mod. 149. But Mr. Serjeant Hawkins says, that the taking of wreck before seizure, cannot be felony, because no one has a property in the goods at the time of the taking. Pl. C. c. 33, s. 24.

(n) F. N. B. 91, D.

the thing being within the manor of which he is lord.(o) And thus the grantee of a wreck has a special property in all goods stranded within his liberty, and may maintain trespass against a wrong doer although such goods were part of the cargo of a ship from which some person escaped alive to land; and though the owner identified the goods within a year and a day; and also although the taking was before any seizure by the grantee.(p) Indeed, by the ancient common law, all property stranded belongs to the King, and after a year and a day it belongs to him entirely. During that term it is vested in the King for protection until an owner can be found.(q)

[\*17] The jurisdiction, when wreck is to be recovered, is not that \*of the admiral, but of the common law, because the wreck is cast upon the land.(r) And so, indeed, it is expressly provided by the statute of R. 2, which mentions wreck of the sea.(s) But the Court of Admiralty shall have cognizance of flotsam, jetsam, and ligan, because the latter are on the sea.(t) And this was agreed in a case where a prohibition was moved for a neif as flotsam, which was found derelict near a harbour in Norfolk.(u)

Moreover, the Court of the Admiralty are to judge of that which happens within their jurisdiction; and therefore, where they decided that a man had taken goods improperly, as having no title to them, there being an admission that he had taken them within the Admiralty jurisdiction, the Court of King's Bench refused to interfere, saying, that they must presume the judgment to have been just, although it was urged on the other side, that the article in dispute was wreck and not flotsam.(v)

If the goods be perishable, it seems that the sheriff may sell them within the year, to prevent loss; and the sale would be good by reason of necessity, which is always accepted by the law.(w) The year and day are to be counted from the time of the seizure, because that is the thing of which the owner would take the best notice.(x) For although the property be vested in the lord before seizure, yet until he seize and take it into his actual possession, it is not notorious who claims the wreck, nor to whom the owner shall repair to make his claim, and shew his proofs,(y) and the person must have a right to seize, in order to bar the owner.(z) And the name of the original owner of the wrecked goods need not be mentioned by the lord.(a)

A year and a day being given to the owner for the purpose of recovering his goods, his course is to produce the clearest evidence possible of

(o) 1 T. R. 480, per Ashhurst, J.

(p) 1 B. & Ad. 831, Bailiffs of Dunwich v. Sterry.

(q) Hagg. Ad. Rep. 18, by Lord Stowell.

(r) 2 Inst. 168.

(s) 15 R. 2, c. 3.

(t) 5 Rep. 106.

(u) 1 Sid. 178, Le Seigneur Admiral v. Linsted. S. C. 1 Keb. 657, nom. the Duke of York v. Linsted. See Palm. 96.

(v) Palm. 96, Bourne's case. (w) 2 Inst. 168.

(x) Ibid.

(y) 5 Rep. 107.

(z) Hale de Jure Maris p. 40.

(a) 9 H. 6, 45.

his right. And there is this distinction between claims made to wreck by the Crown, and by a subject, namely, that in the former case the owner may have a commission; but no conclusion can be arrived at, other than by the \*verdict of twelve men: whereas in the latter, [\*18] the owner may endeavour to satisfy the lord of the manor, or [ \*18 ] other person, by his mark or cocket, or by the book of customs, or by the testimony of honest men; and he may, besides, have a commission, if he fail to satisfy the lord, and prove his case before a jury, or he may have his action at common law. If the commission be awarded on the action brought within the year and a day, it is sufficient, although the verdict be given in the owner's favour afterwards.(a)

In a case between the Lord High Admiral and Sir Henry Constable, part of the goods claimed and taken on behalf of the admiral, passed by the name of wreck; part were flotsam, and so did not pass, and entire damages were assessed. Judgment was, consequently, given against the plaintiff.(b)

The meaning of being fined at the King's will, in pursuance of the act of Parliament, is, that the King's justices shall set the fine.(c)

One incident to the enjoyment of a grant of wreck was, that it did not contribute to the Customs, because the grantor was to have it in like manner with the King, and the King is not chargeable with customs;(d) but it is now made expressly liable by act of Parliament. In the first case upon this subject, the defendant pleaded to an information for landing goods without paying custom, that they were wreck, and cast upon C.'s land, who had wreck as appurtenant to his manor, and that C. saved them, and sold them to the defendant. It was made a quære whether this justification could be supported.(e) But, upon another occasion, it was decided, upon a special verdict, that wrecked goods are not liable to pay custom. And Vaughan, C. J., who delivered the judgment of the Court, said, that such goods or merchandize only could be intended to pay as were imported with deliberation, and by reasonable agents, and that this rule could not be said to extend to wrecked goods, and judgment was given for the plaintiff in an action of trespass.(f) However, we are informed, that this point was reconsidered by all the Judges upon a subsequent occasion, and \*that all, Treby, C. J., especially, [\*19] held, that goods wrecked, or flotsam, should pay custom.(h) But [\*19] it appears, that a case was decided about the same time, after several arguments, and that wrecked goods were not liable.(i) And Holt, C. J.,

(a) 5 Rep. 108. 2 Inst. 168. F. N. B. 112. If the owner die within the year, his executors or administrators may give the required proof. 2 Inst. 168.

(b) Id. 106—108, Sir Henry Constable's case.

(c) 2 Inst. 168.

(d) Vaugh. 164.

(e) Mo. 224, Saunders's case.

(f) Vaugh. 159, Shepherd v. Gesnold and others. 1 Ld. Raym. 388, per Holt, C. J., citing this case.

(h) Molloy, 8th ed. 276, c. 8, s. 9, Power v. Portman, Hill., 6 W. 3, C. B.

(i) 1 Ld. Raym. 501, Courtney v. Bower, and another, by Nevil, J., Powel J. and Blencowe, J.; Treby, C. J., still retaining his former opinion.

recognised this case a few years afterwards, observing, that he thought the matter clear since the decision in *Sheppard v. Gosnold*.(k)

The statute 3 & 4 Wm. 4, c. 52, s. 50, enacts, That all foreign goods, derelict, jetsam, flotsam, and wreck, shall be subject to the customary duties of the realm. Wreck under this statute is not necessarily limited to goods forfeited to the Crown or its grantee, and not claimed within a year and a day. Goods imported into this country were shipped for Belgium. The vessel was lost within a certain distance of Liverpool. The goods were partly thrown on shore, and partly floated on the sea. They were conveyed to the warehouse of the lord of the manor and claimed by the owner. The goods were held chargeable with duty as wreck within this statute.(l)

Customs of lords of manors to take wrecked goods, should be founded upon some consideration. There was a custom in the manor of Miching, that if any ship or boat, sailing or floating on the sea, should strike upon the soil of the said manor, so as to perish, though it were not wreck, yet that the best anchor and cable should belong to the lord. The defendant had seized the anchor and cable of a ship which perished, and trover was brought. It was held a void custom, being without consideration, and no custom of salvage was found.(m) But where an action was brought for taking an anchor and cable by virtue of a similar custom, the defendant, (the lord of the manor of Burling,) shewed, that the lord of that manor had been used, when any wreck happened upon the manor between high and low water mark, to take care of the sick and wounded, and to bury the dead, and to preserve the goods cast there, for the use of the proprietor; and, in consideration thereof, to have the ship's best anchor and cable. It was objected, that the lord was bound to do this from common charity, but the Court held, that here was a consideration, and that the custom was not unreasonable, being for the encouragement [ \*20 ] and safety of navigation. And \*judgment was given for the defendant, the servant of the lord of the manor.(n)

The King has a right of way over any man's ground for his wreck, and the same privilege goes to the grantee thereof;(o) for, originally, all wrecks were in the Crown.(p) Therefore, if, either by grant or prescription, a man has a right to wreck thrown upon another man's lands, of

(k) See *Ld. Raym.* 388.

(l) 10 *Ad. & El.* 646, *Barry v. Arnaud*. S. C. 2 *Per. & D.* 633.

(m) 3 *Lev.* 85, *Geere v. Burkensham*.

(n) 3 *Lev.* 307, *Simpson v. Bithwood*. With respect to plundering wrecks, being in possession of wrecked goods, without giving a satisfactory account of them, offering such goods for sale, exhibiting false signals to a ship, or destroying a shipwrecked vessel or cargo, see 7 & 8 *G. 4*, c. 29, s. 18, 19 and 20; and *Id.* c. 30, s. 11. The taking of wreck before seizure seems not to be felony, because no one has any property in the goods at the time of the taking. *Hawk. P. C.*, c. 33, s. 24; and see likewise on the subject of wrecks generally. *Miege's Laws of Oleron*.

(o) 6 *Mod.* 149, *Anon.*

(p) *S. C.*

necessary consequence he has a right to a way over the same land to take it.(g)

Another royal perquisite is to have swans, which swim upon the sea, or upon its branches.(r) And the same rule prevails upon rivers. Swans, however, do not absolutely belong to the King by virtue of his prerogative, as royal fish or wreck, because it is understood, that a subject may have a property in white swans, although not marked, and that if such escape out of his private waters into an open common river, he may bring them back, and take them again.(s) And Bracton lays down the same doctrine, treating swans as private property as long as they evince an intention of returning to their old waters.(t) However, no one can have a swan-mark, unless by the King's grant, or the grant of his officers, or by prescription.(u) This regal property in swans is, therefore, transferable in like manner with other privileges; and it is further said, that he who has the swan-mark may grant it over.(v)

A qualification to keep swans is required by 22 Ed. 4, c. 6. The preamble states that persons having the charge of swans, had stolen cygnets, and put upon them their own marks, by which means yeomen and husbandmen, and persons of little reputation, had become possessed of swans. The act then goes on to declare, that no person (except the King's son) shall have any such swans or game of his own, nor any other person for his \*use, unless he have freehold of the yearly value [\*21] of five marks above all yearly charges. But as the act was not to come into operation until Michaelmas, it was declared to be lawful for persons who had sold swans, to deliver them, according to contract, betwixt that time and Michaelmas. By way of punishment, it was moreover ordained, that after that feast any of the King's subjects, having a freehold to the above amount, might seize such swans as a forfeiture, and take one-half of them, leaving the other half to the King. It has been shewn, therefore, that swans may be claimed by grant, or prescription with a swan-mark,(w) and without such mark, if the owner be qualified as above, and he retain his swans within his own waters. But it should be remarked, that if such swans gain their natural liberty, and swim in open common rivers, they may be seized there for the King by his officers; for one white swan, without such pursuit, cannot be known from another, and then, being royal fowl, it appertains to the King.(x)

A swan may, consequently, be an estray, and so, says Lord Coke, cannot be any other fowl.(y) Still, it is not competent to seize these birds as estrays, if they be lawfully put into the place where they have been taken, even although they be in a strange manor. And thus it was decided in the trespass for taking swans. The defendant made a claim

(g) S. C.

(s) 7 Rep. 16.

(t) Ib.

(z) Id. 16. It seems that the swan is not a royal bird in Scotland. Erskine, B. 2, tit. 6, s. 15.

(r) Dav. Rep. 56 (a).

(t) Lib. 2, c. 1, fol. 9.

(u) 7 Rep. 17.

(w) See 7 Rep. 18.

(y) 7 Rep. 17. 4 Inst. 280.

by his plea to estrays as pertaining to his lordship, and said, that the swans had strayed, and that proclamation had been made, and that as soon as it was discovered that the swans belonged to the plaintiff, they were delivered up. The plaintiff replied, that he was seized of a manor adjoining to the lordship, and prescribed to have swans swimming through the *lordship* from time immemorial; and he further said, that notice had been given to the defendant that these swans were the plaintiff's property. The Court held the replication good; for as the plaintiff might lawfully put in his swans in the place where, &c., they could not be astray, more than cattle could be in places where they ought to have common.<sup>(z)</sup> So that a prescription is good for swans to swim in another manor or lordship.

It is necessary that a prescription for swans should be accurately set out. One prescribed to have all wild swans which were *feræ naturæ*, and not marked within a certain creek. And it was holden insufficient: it was like prescribing for all pheasants, partridges, &c., within a manor, [ \*22 ] which cannot be, because a man \*may not have such *jure privilegii*, but so long only as they are within the place. Had the defendant alleged that there had been from time immemorial a game of wild swans within the creek, not marked, building and breeding, and had then prescribed to take some of the wild swans and their cygnets, it would have been good, for the prescription would have shewn a lawful beginning, by the assuming of the King's grant.<sup>(a)</sup>

The following custom was adjudged good. Trespass was brought for taking forty cygnets. A custom was pleaded, that if any swan, in water running to the Thames, within the county of Buckingham, come on the land of any man, and build there, and have cygnets on that land, the owner of the swan shall have two of the cygnets, and the owner of the land the third, which shall be of less value than the other two; and it was adjudged to be a good custom, because the possessor of the land suffers them to build there, whence he might drive them off. In this case there were two plaintiffs; the one owned the cocks, the other the hens, and they had cygnets between them, and the plaintiffs joined in one action, because, by the general custom of the realm, the cygnets belong to both the owners in common equally, and the cygnets shall be divided amongst them.<sup>(b)</sup>

It was said formerly, that if any one should steal a swan in an open and common river, lawfully marked, the same swan (if possible) or another, should be hung up in the house by the beak, and that he who stole it should be compelled to give the owner as much wheat as should cover all the swan, by putting and turning the wheat on the swan's head, until it was entirely covered with wheat.<sup>(c)</sup> And by 11 Hen. 7, c. 17

(z) 7 H. 6. 27, Bro. Estrays, pl. 3, cites S. C.

(a) 7 Rep. 15. The case of Swans.

(b) 2 R. 3. 15. 7 Rep. 17, cites S. C.

(c) 7 Rep. 18.



(an act no longer in force,) whoever should steal the eggs of swans out of their nest, was to be imprisoned for a year and a day, and fined at the will of the King: one moiety of the fine to be the King's, the other to be paid to the owner of the land from whence the eggs may have been taken. But now by 1 & 2 Wm. 4, c. 32, (which repealed the statute of Hen. 7), s. 24. If any person not having the right of killing game upon any land, nor having permission from the person having such right, shall wilfully take out of the nest or destroy in the nest upon such land the eggs (amongst others) of any swan, or have such eggs knowingly in his possession, he shall, on conviction before two justices, forfeit for any egg so found a sum not exceeding 5s. with costs. In default of payment the imprisonment may be for two calendar months unless the amount of penalty, exclusive of costs, shall amount to 5*l.*, or for three calendar months in any other case.

\*The swanherd was the ancient officer who had the charge of the royal swans; he is mentioned by Lord Coke in the fourth [\*23] book of Institutes, who says that he had no Court.(d)

It is agreed, that as the King has the sovereign dominion over the sea adjoining to the coasts, and over navigable rivers, he has also a right of property in the soil. And thus it is, that he becomes entitled to maritime accessions, or, as they are called, increments, save and except fish other than royal fish.(e)

This sovereignty has been recognised in very early times. As, in the Rolls of Parliament: The commons pray, that whereas the King and his progenitors always have been lords of the sea, and now it happened that the King is lord of the coasts of both sides of the sea; and therefore pray the King to lay an imposition upon strangers passing over the sea.(f) It is again said, that the sea is not only under the dominion of the King, but that it is his own proper inheritance.(g) Wherefore it is that the soil between high and low water mark has always been claimed for the Crown.(h) Of late years, however, an attempt has been, fruitlessly hitherto, made to defeat this ancient prerogative of the King, and much legal ingenuity has been resorted to in contravention of his dominion.

In the year 1845 an information was filed by the Attorney-General against the Corporation of London, concerning an embankment, upon the ground or soil of the Thames between high and low water mark. The corporation had granted a license to embank so much of the strand or soil of the river as lay between the high and low water mark on the west side, in front of Durrand's wharf in Rotherhithe. The information

(d) 4 Inst. 280. (e) See Schultes, p. 109. (f) Rot. Parl. 8 Hen. 5, N. 6.

(g) Dav. 56 (a). 16 Vin. Abr. 576, pl. 18.

(h) See Mo. 121, Lacey's case. Hale de Jure Maris, p. 13. The Town of New-castle v. The Prior of Tinmouth, 20 E. 1. 3 Keb. 753, in the Earl of Salisbury v. Joyn, &c. Wightw. 167, Att. Gen. v. St. Aubyn. 3 Man. & Ry. 329. 17 L. J., Q. B. 336, Chabot, In re.

stated that the embankment would be detrimental to the Thames, and a public nuisance, by increasing a deposit of mud, and excluding the tidal water. Other licenses were also embodied in the information and stated to be nuisances. The information then proceeded to state that the Corporation had no right to the soil of the river, that the charter of 23 Hen. 6 did not pass such right, and that if it had passed it, the charter had been revoked or annulled; that no sufficient acts of ownership had been proved, and that at all events this was a common nuisance. The information then prayed a discovery of any deeds, &c., which the corporation might possess on the subject. To this information the corporation demurred [ \*24 ] \*for want of equity, but the demurrer was overruled by the Master of the Rolls,<sup>(i)</sup> and the decision was affirmed on appeal of the House of Lords.<sup>(k)</sup>

In 1848 the corporation answered further, asserting their right to the legal ownership of the bed of the river,—that the 9 Geo. 3, c. 16, for quieting the subject against all pretences of concealment ought to protect them, that the Queen was not seised of the port or haven of London, or of the Thames. They affirmed that they had granted the lands as owners, not as conservators, and that they had received fines or rents without accounting, and that the statute 2 & 3 Wm. 4, c. 71, ought to protect them in this matter. They then claimed the benefit of the statute, 21 Jac. 1, c. 14, enabling the subject to plead the general issue in all informations of intrusion, and, therefore, that they were not compelled to make any discovery, or deny in particular any of the matters alleged concerning charters or otherwise. They admitted that they had charters, &c., but they said they could not specify them without disclosing the nature or character of the evidence upon which they proposed to rely. This answer was excepted to by the Attorney General, and the Master certified that the answers were insufficient, upon which exceptions were taken to his report. The Master of the Rolls said, that the office of conservator or bailiff of the river must be considered as derived from the Crown, and held under the Crown by its own grant or commission, or by act of Parliament necessarily made with the concurrence of the Crown. The office of conservator, thus derived, must, from its nature, be held to be fiduciary, and the corporation must be held to have had imposed upon it, not only the duty of faithfully executing the office of conservator, but of so exercising it as to protect, and not encroach upon, the rights of the Crown. The learned Judge said he would not discuss the question whether the Crown could claim more discovery than could be claimed by one subject against another; and, consequently, he held, that the exceptions to the Master's report must be disallowed.<sup>(l)</sup>

The right of the Crown to the soil between high and low water mark at spring tides was raised as a question in a Scotch case in 1849. Certain lands in the neighbourhood of Portobello, Edinburgh, had been

(i) 8 Beav. 270. 14 L. J. Canc. 305.

(k) 1 H. L. 440.

(l) 19 L. J. Canc. 314, Att. Gen. v. Corporation of London. See 8 Beav. 270.

immemorially used by the inhabitants of Portobello for bathing and other purposes of enjoyment. They had been also used as a drilling ground by the Queen's troops. The appellant to the House of Lords against an interlocutor of the Court of Session had erected a wall along the line of this property, \*nearer to the sea by thirty feet than this old wall. The respondents alleged that the wall was built thirty feet [\*25] beyond the bounds of the appellant's fence, and considerably within the ordinary high water mark. The appellant denied that the wall had been built beyond bounds, or that it was within high water mark, or that the sea at high water, in ordinary tides, came within twenty feet of it. It was urged for the appellant that the Crown had no title up to high water mark at spring tides, i. e. at ordinary spring tides, for during extraordinary tides the sea might certainly flow upon land, which unquestionably belonged to the subject. For the respondents it was said, that the appellant was precluded by the terms of his feu charter from averring that he had a right to inclose any part of what was called the sea shore; and further, that the *jus coronæ* did extend to the high water mark in ordinary spring tides. But the Court held, that they were not bound to decide that question, that they were confined to the terms of the appellant's titles and the rights of the Crown; that the rights of the Crown might be limited to the shore covered by the ordinary tides, or might extend to the ordinary spring tides, but that the appellant, being a wrong doer, could not enter into that discussion, and the interlocutors were affirmed.<sup>(m)</sup> This right of property, therefore, being, in the first instance, exclusively in the Crown, it may be further observed, that it is capable of transfer, and that it may be qualified by the *jus publicum* of the subject, where the two rights are inconsistent. When it is said to be capable of transfer, it must be assumed that the soil has become convertible and derelict.<sup>(n)</sup> The soil, according to this reasoning, may be in a subject, as parcel of his manor, for all manors were originally derived from the Crown, or it may be in gross.<sup>(o)</sup>

It was resolved, in Sir Henry Constable's case, that the soil on which the sea flows and ebbs, that is, between the high and low water mark, may be parcel of the manor of a subject.<sup>(p)</sup> Whence it appears that the shore may belong to the subject, either in gross or as parcel of his manor.<sup>(q)</sup> Yet this position has not always been acquiesced in; for in an action of trespass for carrying away soil and timber, it appeared that a quay had been erected in Yarmouth, and that the bailiff and burgesses of \*the town had destroyed it; and Rolle said, that if it were created between the high and low water mark, then it would be- [\*26]

(m) 13 Jur. 713. Smith, Appellant, Officers of State for Scotland, Respondents.

(n) 4 Bac. Abr. 154. Schultes, 110. Hale de Port, p. 27.

(o) 4 Inst. 140, Abbot of Ramsay's case. Ib. Diggs's case. Dy. 326 (6).

(p) 5 Rep. 107. 2 Ro. Ab. 170. Hale de Jure Maris, 12. Ib. 20. 55. The Toppesham case, 16 Vin. Ab. 574 (B a), (3). 2 Anstruth. 614. Although it was once said that a decision, contrary to Sir H. Constable's case, had taken place. 2 Keb. 759, citing Earl of Carlisle v. Stepkins.

(q) 2 B. & P. 477. Hale, ut supra, 13. 26. Id. 27. Parson of Sutton's case, cited.

long to him who might have the adjoining land. But Hale asserted, on the contrary, that it belonged to the King, of common right. However, it was agreed, that if it were erected beneath the low water mark, it would belong to the Crown. In this case, also, it was allowed, that an intruder upon the King's possession might have an action of trespass against a stranger, but that he could not make a lease, whereupon the lessee might maintain an ejectment.<sup>(r)</sup> In this case, if it were understood that the soil between high and low water mark might belong to a subject, by grant or prescription, as might well be the fact, and that the soil below the low water mark belonged to the Crown, as being of little or no value as the subject of a grant, there would be no difficulty in reconciling the opinions of the great lawyers who differed upon that occasion. But the dissenting Judge,<sup>(s)</sup> in *Blundell v. Catterall*,<sup>(t)</sup> (where it was held, that no common law right of bathing in the sea existed), declared plainly, that it was agreed by all, that the sea shore was at first appropriated to the King, from whom the right to it must be derived.<sup>(u)</sup> And the sea shore is the land between the high and the low water mark, or, according to Lord Hale's definition, between those marks at ordinary tides, that is to say, between the ordinary flux and reflux of the sea.<sup>(v)</sup> The sea shore, therefore, says Mr. Callis, is not all one with the sea, nor with the land, but it participates with them both;<sup>(w)</sup> and such as hold the shore to be the extreme point both of land and water, are in a great error;<sup>(x)</sup> for it is not counted to be lands or grounds gained from the sea, or left by it, because it is covered by the waters at every full sea.<sup>(y)</sup> And if the sea gradually gain upon the lands of a subject, it belongs to the Crown.<sup>(z)</sup>

This right, as parcel of a manor, was fully recognized in a more modern case. The learned Judge put this question to the jury: "Is the land between high and low water mark a part of the seigniorship of Gower?"

[ \*27 ] The jury found in the affirmative. The general term of the land claimed was *\*Terra de Gower*; and Parke, B., said, "that if any portion of the sea shore would pass by the word '*terra*,' *cadit questio*." The Court were fully of opinion that the ruling of the learned Judge was correct, and the rule was discharged. And Alderson, B., said, "It was clear from the authorities, that the land between high and low water mark may be part of a manor, and if so, may be granted by the person who grants the manor." And the learned Baron added, that by grant, the subject may hold *below* low water mark, according to the opinion expressed by Holroyd, J., in *Blundell v. Catterall*.<sup>(a)</sup> The fact, therefore, of *Terra de Gower* including the land between high and low water mark, according to the answer of the jury, was deemed sufficient to warrant a

(r) Aleyn. 10, *Johnson v. Barrett*. This latter position was recognized with approbation by Bayley, J., in 4 B. & C. 589. See 2 Keb. 759, *Whitaker v. Wise*. 16 Vin. Ab. 576 (B a), (12).

(s) Best, J.

(t) 5 B. & A. 288.

(u) Id. 275.

(v) Id. 291, by Holroyd, J. *Hale de Jure Maris*, p. 12, citing several authorities; p. 25, &c.

(w) Callis, p. 54.

(x) Id. p. 55.

(y) Id. p. 54.

(z) 5 M. & Wels. 37, in re Hull and Selby, Railway Company.

(a) 5 B. & Ald. 298.

verdict for the plaintiff, the lord of the seigniorship of Gower.(b) The same grant was made use of by the Duke of Beaufort in an action of assumpsit for tolls, in which the Duke recovered.(c)

It may be observed, also, that as there may be a grant to the Crown from an individual, acts of ownership by the individual may be called in aid to shew his exclusive right to the soil between high and low water mark. The evidence given by the lord presumes a grant from the Crown. The verdict was for the plaintiff (the lord), and the Court would not grant a new trial.(d) This exclusive ownership of the sea shore between high and low water mark, may be claimed as a parcel of the manor by virtue of such acts of ownership. And it made no difference that the grant was merely for "wreck of the sea," and did not contain the words "*littus maris*."(e) The plaintiff (the lord) would have succeeded upon another occasion, had the Court deemed the evidence on his behalf strong enough. Park, J., who tried the cause, was not satisfied with the verdict, which was for the defendant, but it was considered that the plaintiff had not made out a claim sufficiently powerful to outweigh a verdict.(f)

A jury, however, empanelled to assess compensation, will not be permitted to enter upon a question of title; as, for instance, between the Crown and the city of London, in the absence of any materials for deciding that point. Therefore, where the jury were directed to estimate the value of land, with an intimation\* that the claimant might or might not be entitled to the fee simple or to the land between [ \*28 ] high and low water mark, a prohibition was granted to restrain the commissioners from recording the verdict.(g)(h)

But notwithstanding the dominion exercised by the Crown over the shore, the public may have easements there by custom, such as the lading and unlading of ships, the drying of nets, and other necessary business.(i)

By 5 & 6 Wm. 4, c. 50, s. 52, (the General Highway Act), it is en-

(b) 3 Exch. 433. D. of Beaufort v. Corporation of Swansea.

(c) 19 L. J., Ex. 97, D. of Beaufort v. Smith; 4 Exch. 451.

(d) 3 Man. & Ry. 329, Lopez v. Andrew, cited there. Id. 474, in the Appendix.

(e) 7 C. B. 861, Calmady v. Rowe. Trespass. Plea; Right of the Crown. The grant was of wreck and several fishery, &c.

(f) Hall's Rights of the Crown, 263, Dickens v. Shaw;—in Trespass.

(g) 17 L. J., Q. B. 336, Chabot, In re. See the following Chapter on Rivers.

(h) The reader is referred to a note at the end of the Treatise, in which this important point of the right of the Crown to the soil between high water mark is further considered.

(i) Callis, pp. 55, 73. Hale, ut supra, p. 17. "The word, shore," says Mr. Justice Bayley, "denotes that specific portion of the soil by which the sea is confined to certain limits. That term is wholly inapplicable to the grant of a privilege or easement; it of necessity comprehends the soil itself." (4 B. & C. 496.) The public, however, may enjoy an easement on the shore independently of any such strict definition of the word "shore," as mentioned in a deed of grant.

acted, that nothing therein contained relative to the gathering or getting of stones or other materials, shall extend to any quantity of stones or other materials thrown up by the sea, commonly called *beach*, where the removal of the same would cause any damage or injury by inundation to the lands adjoining, or increased danger of encroachment by the sea.

With respect to the sea coast, Mr. Callis observes, that they certainly contain the shore and banks; and he cites 27 Eliz. c. 24, an act made for the mending of the banks and works on the sea coasts. He is, however, of opinion, that the act is capable of a larger definition, and that the next town, with its territories lying next to the sea, is in strictness of law the sea coast, and that it is an error to suppose the coast to be itself the edge of land next to the water.(k)

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[ \*29 ] Having now established the general principle, that the soil of the sea and the sea shore is the King's unless by grant or \* prescription (the title to which must accrue from the Crown) it belong to a subject, we proceed to shew the consequences of natural changes, effected in or by the sea, as they affect the property of the soil. The sea may recede on some parts of the coast, as in effect it frequently does, and the land it quits is called derelict land; or having overflowed land before in a state of cultivation, or at least subject to some owner, the sea may reflow,(l) and in each of these cases there must be a proprietor of these acquisitions. A stream may gradually add something to the adjacent shore, and this is alluvion; the characteristic of which is, the imperceptible increase which it effects.(m) If the soil be suddenly torn from the estate of one man, and carried to that of another by the plain action of the water, the effect is called avulsion.(n) Lastly, islands may appear in the sea, and in all these three last cases, it becomes necessary to decide who shall be possessor of the soil which has thus been changed, or newly created.

The first point presents no difficulty; for if the sea belong to the King, the land, when deserted by the sea, will necessarily continue in the same proprietor.(o) But the rule must be adopted with some qualification, as we shall see presently.

The sea relinquished a great quantity of land upon the shore, and the question was, whether the Crown should have this by virtue of the prerogative, or whether the next adjoining owner should have it as a per-

(k) Callis, pp. 55, 56. "A creek of the sea is an inlet of sea cornered into the main land shooting with a narrow passage into some angle of the land, and therein stretching itself more than ordinary into the land." Id. p. 56.

"Such creeks or inlets we commonly term in the law to be arms of the sea." Ibid.

"A shore is sometimes dry land, and sometimes water. A coast is always dry land, but the creek is always sea and never land." Id. p. 57. "I take it that a bay and a creek be all one, and that a mere and a fleet be also of that nature." Ib.

(l) See 5 M. & Wels. 327, In re Hull and Selby, Railway Company.

(m) See Schultes, 116.

(n) Ibid. Hale de Jure Maris, pp. 14, 28.

(o) Callis, 47; and see Bract. Lib. 2, c. 2, s. 2.

quisite; and it is said in the note, that the prince should have all lands left by or gained from the sea.<sup>(p)</sup> Whereas, if the sea leaves the land gradatim, and for but a little quantity, the owner of the land shall have it.<sup>(q)</sup> For of things which are *nullius in bonis*, where no visible right appears, the law gives them to the King, as *derelict land*, treasure trove, &c.<sup>(r)</sup>

The principal opposition to this royal acquiescence has been made in respect of a custom, called the custom of frontages (especially in Lincolnshire), and the custom was alleged to be, that those whose lands lay in front of the sea, should have the derelict soil. The reasons urged in favour of the custom were, that those persons were obliged to keep up defences against encroachments \*of the sea; and that if any overflow happened, they would necessarily be the sufferers. But the usage [\*30] was denied to be valid, upon consideration in the Court of Wards, by reason of the uncertainty as to quantity which the subject might claim under such circumstances; for ten thousand acres might thus be left in front of a manor, and this would be too large an inheritance by virtue of such a custom. In one case, therefore, the claimant was put to obtain a grant from the Crown, and, in another, a decree was made against the party seeking to gain this derelict land under the custom of frontage.<sup>(s)</sup> And sometimes there exists a custom of this nature in other places, as in parts of the river Severn.<sup>(t)</sup>

We have said, however, that this rule of general property in the King, when land is derelict by the sea, must be entertained with some qualification. And thus it is laid down, that if the sea overflow my land for forty years, and afterwards reflow, I shall have my land, and not the King.<sup>(u)</sup> The chief principle is, that there should be some distinguishing sign, generally a sea-mark, whereby the land may be recognized. There was a process in the Exchequer against The Abbot of Ramsay, to shew why sixty acres of marsh land should not be seized into the King's hands, the abbot having appropriated this marsh to himself, without the King's license. The abbot answered, that he held the manor of B. situate near the sea, and that there is a certain marsh there, which is sometimes lessened by the influx of the sea, and sometimes enlarged by the sea's efflux, and he denied the appropriation, &c. And this case was determined against the King, the verdict being found for the abbot.<sup>(v)</sup> And again, it is said in the note to that case to have been adjudged, that if the sea-marks be gone, so that it cannot be known if ever there were land there, the land gained from the sea belongs to the King. But if the

(p) Dy. 326, b. n. 2. 1 Keb. 301; where it is said, that the right is as ancient as the King's Crown. 2 Keb. 759, *Whitaker v. Wise*.

(q) Dav. Rep. 56. 2 Ventr. 188.

(r) 2 Ventr. 268.

(s) *Callis on Sewers*, 48. *Sir Valentine Brown's case*. *Bushey's case*.

(t) *Hale de Jure Maris*, p. 34; and see post, Ch. 13, on Evidence.

(u) By Coke and Foster, 16 Vin. Ab. 574. *Hale de Jure Maris*, p. 15.

(v) Dy. 326 (b). The Abbot of Ramsay's case cited there, S. P. in the Exchequer. *Digges v. Hammond*, cited there; and see *Hale ut supra*, p. 15, &c. 4 Inst. 140. 16 Vin. Ab. 575, (B a), (9).

sea cover the land at flux of the sea, and retreat at the reflux, so that the sea-marks are known, if such land be gained from the sea, it belongs to the owner.(w)

And so again, the marshes overflowed by the sea in Lincolnshire and Norfolk, at spring tides, or otherwise, are not derelict lands, because they [ \*31 ] are easily distinguishable, and the courses of the ocean are in this case no other than ordinary.(x) So \*where the river Severn had gained upon the vill of Shinbridge, but receded again, it was held, that neither the neighbouring vill nor the Crown should have the land left derelict. The boundaries being sufficiently marked prevented either of these dilemmas from taking place.(y)

Being derelict, and not appertaining to any original owner, land so gained from the sea becomes vested in the King; and it remains, therefore, to be observed, that this right also is transferable, and that lords of manors and other persons, frequently claim it by grant or prescription. Thus, the Abbot of St. Peter's was presented for taking three hundred acres of waste land in Lincolnshire, without the King's license; and an immemorial custom was alleged, that all the lords of manors, lands, and tenements on the sea coast there ought to have waste land and sea land, derelict, or thrown up at the flux and reflux of the sea; and that he, the said abbot had a manor, &c. And thereupon a jury were directed to come, &c.(z)

But it seems, that no prescription can extend to lands farther than the low water mark, because a subject can have no use of such as are beyond: although between the high and low water mark a prescription of that kind may exist, because the lands are dry for twelve hours in every day.(a)

Some few words may properly be said here upon a subject very nearly allied to the present, namely, upon grants of land to be recovered from the sea by embankments, or otherwise. And it has been determined, that in order to maintain a good title to such grant, the land must be reduced into possession within a reasonable space of time. The defendants were charged in an information with erecting a wharf, &c., between high and low water mark, in Portsmouth harbour, adjoining to Gosport, so as both to prevent vessels from sailing over that spot, or mooring there, and also to endanger further damage to the harbour, by preventing the free current of the water to carry off the mud. The information prayed, that the defendant might be restrained from making any further

(w) Dy. 326 (a), n. 2. Corporation of Romney's case, S. P. 2 Ro. Ab. 168. Callis, p. 51.

(z) Callis on Sewers, p. 50.

(y) Hale de Jure Mariæ, p. 18. Villata de Shinberg.

(x) 16 Vin. Ab. 574, pl. 3. See also 7 Jac. 1, c. 18. An act for the taking, landing, and carrying of sea-sand for the bettering of ground, and for the increase of corn and tillage within the counties of Devon and Cornwall.

(a) Callis, p. 49.



erections, that those made might be abated, and that the harbour might be restored to its ancient situation. The defendant set forth a grant from the Crown, of certain lands overflowed with the sea on each side of Gosport, under letters patent, dated in 4 Car. 1, \*rendering a certain rent for every acre recovered till 1680, and thereafter a [\*32] certain other rent. Two of the defendants pleaded possession for more than sixty years, and it was admitted that there had been such a possession of a piece of mud land adjoining to the piece in dispute. The ground in question, however, had never been recovered from the sea, till the erections complained of by the bill, and these were made after notice of the intention to dispute the right; but the defendants had for some time before kept possession by means of floats of timber moored there. It was also found, that the embankment now made was highly prejudicial and dangerous to the harbour, and hurtful to Gosport, as stated in the information. There was even some doubt upon the evidence, whether the place in question had or not been included in the grant. However, it was argued for the Crown, that by the nature of the grant, it appeared that this land should have been reduced into possession in a reasonable time, if at all; that the embanking within a reasonable time was a condition annexed to the grant, and which was left unperformed for one hundred and fifty years, and that the nonpayment of rent during that period, shewed that there had neither been an actual nor a constructive possession. It was said on the other side, that from the circumstance of part of the land mentioned in the grant having been embanked for a considerable time, (and which was so,) the immediate embankment of the whole was not expected, and that as no time had been limited, it was still open to the grantee's successors to take advantage of it. But the Court were of opinion against the defendant. They noticed, that part of the grant exempted the new land from tithes for seven years, and said, that the intention clearly was, to have the soil put into a state to produce titheable matter. The rent also proved, that the embankments, and retaining from the sea, were the condition and spirit of the grant. That condition had not been complied with. Moreover, the place had been suffered to remain open as a public passage since 1629, and that circumstance would preclude any right to question the title of the Crown. It would be extremely inconvenient if old dormant grants of the Crown could be thus enforced, when the evidence of their nature and extent is lost by lapse of time. The soil was, therefore, decreed to be the property of the Crown, and the buildings were ordered to be abated. (b)

The success attending this case encouraged other efforts on the part of the Crown to regain rights which had been unduly assumed by others, and likewise to vindicate the public \*convenience. The Attorney General brought another information in respect of this harbour. And it was admitted that the Crown might grant, by letters patent, to a corporation, &c., all land between high and low water mark, [\*33]

(b) 2 Anstr. 603. 614, Att. Gen. v. Richards. S. C. 1 Dow. 316, nom. Parmeter v. Att. Gen.

but, at the same time, subject to the public right of passage. An obstruction of such a right is a nuisance, and is a matter of fact to be inquired into. The Court might either determine this question upon the evidence, (an English bill had been filed in the Court of Exchequer,) or direct an issue.(c) Thus again, buildings, erections and inclosures, between high and low water mark, in the harbour of Portsmouth, were abated by a decree in like manner, inasmuch as they interrupted the flux and reflux of the sea. And it was no defence that they had been placed there by the corporation under a grant from the Crown by Charter. The grant was void as to such parts as were open to these objections; at all events, it did not divest the Crown nor invest the grantee *quoad* such parts. No general order could be allowed to prevail against the public rights.(d)

There is a difference, as it seems, between a grant of so much land covered by the sea to be presently redeemed from it, and a grant of land which may by possibility be so recovered, because a bare possibility does not lie in grant. In the former case the land was at once made the subject of the grant, although overflowed with water; but in the following, the deed was to operate in future. It was a grant of certain marsh land near the sea, together with all the soil, ground, land, sand, and marsh land adjacent, which were then covered with water, or which at any subsequent time might be recovered by the reliction of the sea, or otherwise, not naming the value, quantity, or quality. After this, one hundred acres were left derelict by the sea adjoining to the marsh land so particularly granted, and the question was, whether the King or the patentee should have this soil. It was insisted, that the grant was void by reason of the bare possibility. On the other side it was urged, that here there was such a certainty as the thing itself was capable of having; and it would be difficult to say, that the King has an interest in a thing, and yet that he cannot dispose of it. And, moreover, it was observed, that even taking the grant to be uncertain, the omission to name the worth, quantity, or quality, would cure any default for want of information in the King. But, notwithstanding this, the Court held, that as to the one [\* 34] hundred acres, the patent was void, and that "nothing passed by [those general words.(e) In this case also it was said,(f) that there was a custom in Lincolnshire for the lords of manors to have derelict lands; and that it was a reasonable custom; for if the sea wash away the lands of the subject, he can have no recompense, unless he be entitled to what he may gain from the sea.

This probably, was the custom of frontagers referred to above, and which was held to be an invalid custom; but there might be a prescrip-

(c) 10 Price, 350, Att. Gen. v. Burrigge.

(d) Id. 378, Att. Gen. v. Parmeter. Affirmed in error, Id. 412.

(e) 2 Lev. 171, Att. Gen. v. Sir Ed. Farren, in the Exchequer. 2 Mod. 106. S. C. nom. Att. Gen. v. Sir E. Turner. Sir Tho. Raym. 241. S. C. nom. Att. Gen. v. Sir E. Farmer.

(f) 2 Mod. 107, by counsel arg.

tion to that effect, for a previous grant from the Crown could then be supposed.

By an act of Parliament a company was permitted to embank certain lands which had been overflowed by the sea. In doing this the company made a drain, and left several recesses between the projecting points of the cliff. These recesses were overspread with sea-weed and beach, and at high tide) were covered by the sea. It was held, that the recesses belonged to the adjoining proprietor, there being no proof of adverse ownership, and the presumption being accordingly against the Crown, they were held not to pass to the embankment company.(g)

Concerning alluvion, Fleta writes thus: "We acquire a right to things, according to the law of nations, by accession. That which a stream has added to our land by alluvion, for instance, belongs to us by virtue of the same law."(h) Now we have seen, that the meaning of alluvion is the secret accession of soil to other soil. This newly-acquired land, therefore, does not belong to the King, but to the owner of the ground to which it attaches itself. So, again, the distinction between derelict land and alluvion is drawn thus: If the sea leave the land gradatim, and but for a little quantity only, the owner of the soil shall have it; but if for a great quantity, and at a time, it goes to the King.(i) This increase *per alluvionem* is when the sea, by casting sand and earth, increases the land by degrees, which, consequently, protrudes itself out further than its ancient bounds.(k)

\*The reason of this indifference on the part of the Crown to alluvial soil is said, by Sir William Blackstone, to be either because *de minimis non curat lex*, or because owners of land being often losers by the breaking in of the sea, or being at charges to keep it out, have thus a possible gain as a reciprocal consideration for their possible charge or loss.(l)

This subject underwent some consideration in a recent case, and the distinction above adverted to was fully recognised. An inquisition was taken in Lincolnshire, by which it was found, that certain land had been derelict by the sea, and consequently the commissioners seized it for the Crown. Lord Yarborough, the defendant, traversed this inquisition, alleging that the land said to have been derelict had been formed by alluvion; and issue was joined. It appeared at the trial, that the alteration had been slow and gradual, that the gain in twenty-six or twenty-seven years was on the average of about five yards and a half in a year; but

(g) 3 B. & Ad. 863, *Lowe v. Govett*. Trespass. Not guilty, and lib. ten. Issue. Whether upon this issue the plaintiff might prove twenty years' adverse possession, or whether it should have been specially replied, was made a quare.

(h) Fleta, lib. 3, c. 2, s. 6. Bract. lib. 2, c. 2, s. 2.

(i) Callis, 51. *Hale de Jure Maris*, p. 28. See 22 Ass. pl. 93.

(k) *Hale de Jure Maris*, p. 29. Abbot of Peterborough's case, Id. p. 14. 30 Rex v. Oldsworth. See Dy. 326 (b). 16 Vin. Ab. 576 (B a), (13).

(l) 2 Comm. 262. Callis, p. 51.

that this increase had been imperceptible, that is to say, imperceptible in its progress. A verdict was found for the defendant, and after an argument in support of the motion for a new trial, the Court gave judgment against the Crown; for the distinction between land derelict in consequence of the retiring of the salt water, and land gained by alluvion, or the projection of extraneous matter, presented itself too clearly to be misunderstood; and it was very plain, that the land in question was of the latter description, and therefore that it could not belong to the Crown.(m)

It has been held also, that the grantee of premises situated on the shore has no right to follow the sea, or take the land acquired from it, where a corporation had a right to the whole territory of the burgh vested in them by their charter. The case was first decided in Scotland, and the appellant, the grantor of premises as before described, sought to reverse a decree given there against him. He possessed a small inclosure situated in the burgh of Dundee, bounded by the sea floods. The water receded, in consequence of embankments and other improvements, and a tract of dry ground was left between the sea or high water mark, and the appellant's inclosure; and the corporation exercised rights of ownership from time to time over this derelict land. This ground, called the shore, was claimed by the appellant; but it was insisted on the other side with effect, that the boundary by those floods was made use of as a [ \*36 ] term of description, \* and that the description in question was to be considered as accurate only at the date of the first conveyance; and, moreover, by the uniform and unvaried usage of the town of Dundee, no right to the sea shore could by possibility have been granted by the conveyance under which the appellant claimed. And it was accordingly ordered and adjudged, that the interlocutors should be affirmed.(n)

It has been held in equity, that the right of the subject to traverse an inquisition extends to every case in which property is found in the Crown; and not merely to cases of a claim by the Crown by reason of incidents of tenure, as escheat. But the Court will not quash an inquisition on the prayer of the subject, as in the case of the Crown; the only course is a traverse on the behalf of the subject. And the Court held, moreover, that in order to obtain leave to traverse, the petition must shew a prima facie against the Crown.(o)

Sir William Blackstone observes, that if the alluvion or dereliction be sudden and considerable, it goes to the King; because as he was owner of the soil when covered with water, it would be but reasonable that he

(m) 3 Barn. & Cres. 91. The King against Lord Yarborough, S. C. affirmed in the House of Lords. 5 Bing. 163. S. C. 2 Bligh. N. S. 147. 1 Dow. N. S. 176. S. C. 4 D. & R. 790. S. P. 4 B. & C. 485, Stratton v. Brown.

(n) 8 Brown. Cases in Parl. 119, Smart v. The Corporation of Dundee.

(o) 4 Madd. 281. Ex parte Lord Gwydir and another, and see post, Chap. XIII., Evidence.

should have the soil when the water has left it dry.(g) This forcible direction of the land is, however, styled avulsion by most writers, to distinguish it from alluvion, the characteristic of which latter is imperceptible increase. And thus Fleta writes, that the property in land severed by avulsion is quite different from alluvion, for here the increase is not hidden, but manifest.(g) Upon such an accident, therefore, the Crown will be entitled to land so forcibly surrendered and left derelict.

Lastly, with respect to islands which rise up in the sea,(r) the same principle which has been above adverted to, will be found applicable upon this occasion also. For such an island belongs *prima facie* to the universal occupant, and he is the King. He owned the soil of the sea, which flowed before over the soil of these newly risen lands, and, therefore, his property must continue the same; and the construction of islands is either by the recess or sinking of the water, or the accumulation of sand and earth, which becomes, in process of time, solid land environed with water.(s) Britton says, that if an island grow up in the sea,\* it shall belong to that lord who shall be found to be the possessor of [ \*37 ] it; and that if it be torn off from the continent, it shall appertain to the former owner of the adjacent ground.(t) This latter case, however, is a species of avulsion; and upon the same principle by which a man is enabled to repossess himself of his own land when the sea has left itself, it seems that he may lay claim to an island thus created, not by rising up in the sea, but by separation from the main land. Fleta again says, that upon the rise of an island in the sea, it shall be given to the occupant, that is, provided it be severed, and not held to the main land by twigs or branches.(u) This occupant must be understood to mean the King, as universal occupant, for otherwise the doctrine thus laid down cannot be reconciled with our law, which clearly concedes all such property absolutely to the Crown; and, indeed, Mr. Callis considers that these writers have misconceived the law in this respect.(v) By the civil law, certainly such islands were deemed to be the property of the first taker.

Mr. Callis observes, that if an island have arisen as aforesaid, although it be within the realm, yet it is not within any county, parish, or town, until the King so declare it by his edict or proclamation.(w)

Nevertheless, where the interest of that part of the sea, or arm of the sea, or creek, or haven, where the island rises, shall happen to belong to a subject, either by charter or prescription, the islands rising within the precincts of such private property will belong to the subject, according to

(p) 2 Comm. 262.

(q) Lib. 3, c. 2, s. 6. Bract. lib. 2, c. 2, s. 2. See Dy. 326 (b).

(r) This seldom happens, on account of the great depth. Schultes, p. 117.

(s) Hale de Jure Maris, p. 17, 36. Or by the separation of land from the continent, *vide infra*.

(t) De Purchas, fol. 86 (b). (u) Lib. 3, c. 2, ss. 6. 9. (v) On Sewers, 44.

(w) Id. 45. That the laws of England are in force in such newly risen islands, when it pleases the King to declare that such shall be the case. See Callis on Sewers, p. 46; see also Bract. lib. 2, c. 2, s. 2, fol. 9.

the limits or extent of his property.(x) And in this sense both Bracton and Fleta must be understood, when they speak of specified limits, where the right of alluvion is not applicable. Thus, in grounds which are marked out by boundaries, (private property), the right to an island is not governed by the mere reason of contiguity to a public stream, which in ordinary cases gives the soil thereof to the King, on account of his royal privilege.(y)

The law, however, prejudices no man, and therefore, if the sea, or a stream, should encircle a field, the case is taken out of the ordinary rule; and the field, now become an island, shall not be the less his to whom it originally belonged.(z)

A custom for inhabitants to dig or take from closes adjoining the sea shore and drifted from time to time from the shore, and carried by the wind into these closes is bad; 1st, because the sand becomes part of the closes, and so the custom would be to take a profit in alieno solo; 2ndly, for uncertainty, because it is impossible to distinguish between the soil of the original closes and the sand from all time drifted upon it.(a)

Thus much concerning the *maritima incrementa*, or *sea acquists*.(b)

The last point in this Chapter to which we propose to direct the attention of the reader, is the manner of claiming these several rights in the sea; and for the sake of brevity, those also in public rivers, more especially as the same principles belong to both.

With regard to navigation, and public fisheries, they are the inheritance of the subject, by virtue of the general title, or *jus publicum*, which every one possesses. But all maritime rights are not demandable by virtue of this universal exercise of privilege. Supposing that a right of bathing should exist on any particular coast, or on the banks of any public river, it must be claimed by custom, because there is not any common law right of this nature.

So again with regard to wreck. If any lords of manors should lay claim to such a privilege, they must do this by custom; as where they claim it on a certain coast; or by prescription, which belongs to the per-

(x) Hale de Jure Maris, p. 36. Cited by Holroyd, J., 5 B. & A. 293.

(y) Bract. lib. 2, c. 2, s. 2. Fleta, lib. 3, c. 2, s. 9.

(z) Fleta, lib. 3, c. 2, s. 6.

(a) 3 Ad. & El. 554, Blewitt v. Tregoning. S. C. 5 Nev. & M. 234. Whether such a right can be claimed by prescription; *quære?*

(b) That islands in the sea belong to the next adjoining continent. See Craig. Jus. Feud. lib. 1. Schultes, p. 120. And with respect to the theory of the general occupancy of the Crown. See Id. 128.

son of each; or by express grant, for it will not pass under general words, and parol(c) evidence is not admissible.(d)

So, again, a right to have marked swans must be sustained in like manner by grant or prescription.

\*If a private person claim the soil of the sea, or of a branch of it, exclusively of others, he must make out his title by the King's [\*39] charter, or grant,(e) or prescription. So if the lord of a manor claim a right to cut sea-weed, exclusively, on rocks below the low water mark, he must prove either a grant from the King, or the exclusive enjoyment of it for so long a time as to confer on him a title by prescription. The possession must be long, continued, and peaceable, according to the English law, the civil law, and the laws of Norway, France, and Jersey.(f)

And if he claim a several fishery in the sea, the same mode of claim must be adopted; but it should be added, that the King cannot at this day grant a several or free fishery in the sea.(g)

So, again, with respect to derelict lands, they must be claimed, if by a subject, by grant, inasmuch as until they be derelict, they cannot be the subject of transfer; but there may be prescriptions on some coasts, as in Lincolnshire, or on the banks of some rivers, for lords of manors, or inhabitants of tenements, &c., to have such lands when relinquished by the sea, instead of the Crown.(h)

As to lands which it is proposed to recover from the sea, or islands which are newly risen therein, or in rivers; it seems also that no other than an express grant will make a claim to such sustainable; and the property so conceded must be acquired, or taken possession of within a reasonable time afterwards, or the right to the Crown will be held to revive.

(c) See post, Chap. XIII., Evidence.

(d) 2 M. & P. 625, *Alcock v. Cooke*.

(e) *Hale de Jure Maris*, p. 17. A grant of a manor or land contiguous to the sea, *una cum maritimis incrementis*, will pass the right of alluvion, though the lands derelict. *Id.* 17, 18.

(f) 1 Knapp, 60, *Benest*, Appellant, *Pipon*, Respondent.

(g) See the fifth Chapter, where the subject of fishery is discussed separately.

(h) *Callis*, p. 48.

## [\*40]

## \*CHAPTER III.

## OF RIVERS; THE OWNERSHIP OF THE SOIL THEREIN, AND OTHER MATTERS.

A RIVER has been defined to be a running stream, pent in on either side with walls and banks, and it bears that name as well where the waters flow and reflow, as where they have their current one way.(i)

Rivers are either public, as where there is a common right of navigation exercised, and then the soil is in the King, or in the lord of the manor; or private, where the soil is the property of the individual who owns the land on both sides, or of each proprietor, *ad medium filum aquæ*, where the same person is not owner of the shore on either brink.(k) A mere enumeration of the public and private immunities enjoyed in rivers has already been attempted;(l) but there are other important matters connected with the subject which it is desirable to introduce here, as, for instance, the nature of a public river; the ownership of the soil in rivers generally; the property in soil which has been created by alluvion, or *broken away from its original position*, &c.

A public navigable river frequently owes its title to be considered as such from time immemorial, by reason of its having been an ancient stream; but very many acts of Parliament have been passed to constitute those navigable rivers which were not so before.(m) Waters flowing inland where the public have been used to exercise a free right of passage from time whereof the memory of man is not to the contrary, or by virtue of legislative enactments, are public navigable rivers. This is the most unfailing test to apply, in order to ascertain a common right; others have been attempted, and frequently without success. Thus, it has been said, that in the case of a river which flows and reflows, and is an arm of the [ \*41 ] sea, it is, *prima facie*, common \*to all;(n) and upon the strength of this position, it was urged upon one occasion, that an action on the case could not be sustained against the corporation of Lynn for the non repair of a certain creek, because the tide of the sea had been accustomed to flow and reflow therein; consequently it was said, that this non-feasance was punishable by indictment only, because the water must be deemed public. But this argument was treated by the Court as a fallacy; for they denied that the flowing and reflowing of the tide constituted a navigable river, there being many places where the tide flows which are navigable rivers; and the place in question might be a creek in the, private estate of the corporation.(o)

(i) Callis, p. 77.

(k) See Schultes, 134.

(l) Ante, Chap. I.

(m) "Few of our rivers besides the Thames and Severn, were naturally navigable, but have been made so under different acts of Parliament." 3 T. R. 255, by counsel, arg.

(n) 22 Ass. pl. 93, by Holt, C. J., 1 Mod. 105.

(o) Cowp. 86, *The Mayor of Lynn v. Turner*. Loft. 566. Sembl. S. C.



The words of Mr. Justice Bayley also are very illustrative of this point, in a case where a public channel, once navigable, had been blocked up by mud, and the right extinguished. The flux and reflux of the tide had been relied upon in favour of the public right. "The strength of the *prima facie* evidence, arising from the flux and reflux of the tide," said the learned Judge, "must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it had been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a short time, and for only small boats, it is difficult to suppose that it ever has been a public navigable channel."(*p*)

Still it ought not to be withheld, that, where there are no circumstances from whence an extinguishment of the public right can be presumed as in the last case, the flowing of the tide is strong *prima facie* evidence. It is not absolutely inconsistent with a right of private property in a creek, or other such water; but, unanswered, it would be difficult for a jury to resist such testimony. Thus, the plaintiff sued the defendant for obstructing his barges in a certain navigable river, called Rainham Creek, and he obtained a verdict. He proved, that the place was a creek, running down from a bridge in Essex to the Thames, and that the tide flowed and reflowed in the creek as far as that bridge; and that boats and vessels came up the creek; also, that parties of pleasure had been known to sail up the creek; and that boats had come there with persons who had cut reeds along the banks of the creek. The defendant elicited, by cross examination, that nearly all the vessels alluded to came to load or discharge cargoes at a wharf of the defendant's on the side of \*the creek; and they shewed, by evidence, that [ \*42 ] they had purchased their premises for a large price, which were conveyed to them by the description of Rainham Wharf and Creek; that the creek was not navigable until the predecessors of the defendants had, at a very considerable expense made it so, and erected a wharf; and that the defendant had received, not only wharfage but tolls also for navigating the creek; and that such supposed dues had even been paid by the plaintiff himself. The Court, after hearing a statement of these facts, declared, that the case of the defendants was extremely doubtful, upon their shewing. They said, that the defendants might provoke another action, if they thought to produce stronger evidence in support of their right; for that the judgment, though strong, would not be conclusive against them. A rule to set aside the verdict was therefore refused. (*q*) L. C. J. Gibbs considered the cutting of reeds as a very strong act; and with respect to the pleasure-boats, he said, that if a person wishes to protect his exclusive possession, he must keep up the evidence of his right, by guarding it against intruders. (*r*) And Heath, J. adverted to the fact of the defendants having at some time scoured

(*p*) 4 B. & C. 602.  
(*r*) 5 Taunt. 706.

(*q*) 5 Taunt. 705, *Miles v. Rose*. S. C. 1 Marsh. 313.

the channel, observing that they might have done so for their own convenience.(s)

The circumstance, therefore, of the flow and reflow of the tide is one of the strongest in support of a public right, but so far from being conclusive, we have mentioned a case, in which such a test has been found to be fallible. Public user for the purposes of commerce is, consequently, the most convincing evidence of the existence of a navigable river, and that fact being established, the accompanying rights of fishery, and of ownership of soil, &c. are easily defined. And the mouth of a river comprehends the whole space between the lowest ebb and the highest flood-mark. Because the water is salt it is not the less a part of the river if the tide ebbs there, and because the fresh water above is much impregnated with salt, it is not the less a river. Therefore where the question was whether the defendants had illegally used their stake-nets, for the taking of salmon, and the distinction lay between "river and sea," a direction, that the fact of the absence or prevalence of the fresh water was the point to be looked to, was held to be erroneous.(t)

A river is a common highway, or, as Lord Coke expresses it, a common river is as a common street.(u) And, by analogy to the case of [\*43] "highways, there may be a dedication of a private right in a river to the public. But it seems that it must be absolutely devoted to the general use, the evidences of which would be—works at the common expense, public authority, or some unequivocal act of dedication; for Lord Hale says, that if a private person make a stream navigable by making locks, &c., he may pull them down again, and convert them to his private use, there being no proof of a public right.(v) Other evidences are mentioned, namely, the stopping of some other public stream for his own convenience,(w) or the purchase of a charter for the taking of reasonable toll.(x)

As to the rights which may be enjoyed in rivers generally, they have already been detailed in the first Chapter. Other rights deserving particular mention as fisheries and water-courses, will be treated of in subsequent pages, set apart for that purpose: we, therefore, propose to say a few words on the subject of decoy ponds, and then to proceed to the consideration of the ownership of the soil in rivers.

Ancient decoys may be said to be rights connected with our present subject, and they have always received protection from the law. The owner of the decoy pond is at the expense of servants, engines, &c., for the purpose of furnishing the markets of the nation with wild fowl, and it is, therefore, reasonable that encouragement should be given to such artificial contrivances.(y) It has, however, been contended, that wild

(s) Ibid.

(t) 6 Cl. & Fin. 628, *Home v. Mackenzie*.

(u) 13 Rep. 33. *Noy. Rep.* 103.

(v) *De Jure Maris*, p. 9.

(w) Id. 10. *Abbott of St. Austin's case*, *Canterbury*, cited there.

(x) Id. Ibid.

(y) By *Holt, C. J.*, 11 *East*, 577, cited there, from *MSS.*

ducks were not such fowl as the law would take notice of, and that an action upon the case for shooting at, disturbing, and scaring them, could not be supported. But the Court repelled the objection. Even had the defendant shot in his own ground, with an intention to damage the plaintiff, it would have been a wrong, although if he should have had occasion to shoot, it would have been otherwise. But here the defendant had manifestly done an injury to the plaintiff's property, by frightening away his birds, and judgment was accordingly given for the plaintiff.<sup>(r)</sup> A similar right was recognised by the Court in a more recent case. There it appeared that the plaintiff had a right to a decoy, which was ancient, that the defendant gained a livelihood by shooting wild fowl from his boat on the water, and that he had license from the admiralty to fish and coast long the shores of Essex in a boat with small arms. The decoy was situated on one of the salt creeks, called the Blackwater-River, where the tide ebbed and flowed. The disturbance complained of was, that the defendant had fired his fowling-piece within about a quarter of mile of the decoy, when two or three hundred wild fowl came out, that he then approached nearer, and killed several wild-geese, and four or five hundred wild fowl took flight from the pond on the noise of the gun, but there was no evidence to shew that he had fired into the decoy. The matter having been left to the jury, they found for the plaintiff, with 40*s.* damages. It was moved to set aside this verdict, on the ground that the defendant had a right to shoot at the place where he was, it being an open creek or arm of the sea, where the tide flowed and re-flowed; and it was urged, that he had neither gone upon the plaintiff's land, nor fired into the decoy. But the Court declared that there was no pretence for disturbing the verdict, and Mr. Justice Le Blanc referred to an old precedent of such an action, followed by one or two others within his remembrance, on the Norfolk Circuit.<sup>(s)</sup>

As a general principle, the soil of ancient navigable rivers where there is a flux and reflux of the sea, belongs to the Crown,<sup>(t)</sup> and that of other streams to the subject, that is, to the owners of the adjacent grounds, to each respectively, as far as the middle of the stream.<sup>(u)</sup> So that, as concerning public streams, we must go further than merely to call them highways, for they are also the *King's* highways. And so it was found in former days, that the river Lea was the king's high-street.<sup>(v)</sup> Again, inasmuch as rivers, as far as the flowing and re-flowing of the tide extends, participate in the nature of the sea, and are, indeed considered as branches of the sea, they are called royal streams.<sup>(w)</sup>

(r) 11 Mod. 74. 130, *Keble v. Hickringill*. S. C. 3 Salk. 9. S. C. Holt. 14. 17. 19. Bull. N. P. 79.

(s) 11 East, 571, *Carrington v. Taylor*.

(t) 1 Sid. 86.

(u) *Hale de Jure Maris*, p. 1.

(v) 19 Ass. pl. 6. 2 Inst. 38.

(w) See *Dav. Rep.* 55. *Ow.* 123. *Schultes*, 132. But the banks of rivers, together with the trees, &c. belong to the owner of the soil adjoining, and so also do sea banks. *Callis*, pp. 73. 115. But the owners cannot justify the digging or casting them down. *Id.* p. 74.

So, upon another occasion, where there was a dispute concerning some houses at Blackwall (the city of London claiming them under a grant from the Crown, and the lord of the manor of Stepney as built upon his own soil,) it was said several times without contradiction, that all rivers as high as the flux and reflux of the sea belong to the King, and not to the lords of manors unless by prescription.<sup>(x)</sup> So, again it was distinctly affirmed \*by Hale, C. J., that the soil of the river [ \*45 ] Thames was in the King, the lord mayor being the conservator of the river.<sup>(y)</sup> Again, the King granted the lastage and ballastage of all the vessels in the Thames to the Trinity House, together with the soil. Quo warranto was brought against the defendants for taking gravel and sand from the river according to this grant, and although they were turned round upon a point of pleading, the Court was quite clear in favour of their right to take this gravel and sand, for it was admitted that the soil of all navigable rivers in England belongs to the King.<sup>(z)</sup> A case occurred, however, where it was attempted to be argued, that the right of the Crown to the soil of the Thames extended no further than London Bridge, that the sea did not properly flow beyond the bridge, and that the tide above that limit, was occasioned by the pressure and accumulation backwards of the river water. The defendants were indicted for obstructing the mayor and commonalty of the city of London, by cutting down a wooden pile fixed for the purpose of a making horse towing-path on the soil of the Thames, under powers vested in the corporation by certain statutes. The fact was that the city of London had erected piles on the bed of the river near Richmond, within the high water-mark, and adjoining to a wharf in the possession of the defendants; and the question was raised, whether the right of the soil in the bed of the river, *usque ad filum aque*, was in the owner of the ground adjoining to the river. The counsel for the defendant observed, that the soil must have some owner, that the city had no claim to it, that they did not pretend to any ownership in the soil, and that there was this distinction with respect to the right of the Crown, namely, that it existed in navigable rivers as far as the ebb and flow of the sea, but not beyond that limit, and that such a right did not depend alone on the circumstance of the river being navigable. He insisted that the Thames above London Bridge might be considered as having been kept in a navigable state by art, and that the flux and reflux did not properly happen there. But Lord Mansfield stopped the counsel in reply, and said, that the distinction between rivers navigable and not navigable, and those where the sea does not ebb and flow, was very ancient, but that this distinction seemed to be entirely new, and there were no new facts in the case which let in the difference contended for between the flux of sea-

(x) 1 Sid. 149. In *Bulstrode v. Hall*. See also 1 Mod. 106. 2 Mod. 107.

(y) 1 Mod. 106. The river Thames has been declared by statute to be navigable from the city of London to the village of Bercott in Oxfordshire, and from Bercott westward, somewhat further than Lechlade in Gloucestershire. 6 & 7 W. 3, c. 16, § 1.

(z) 1 Sid. 85, *Rex v. Trinity House*. 1 Keb. 300, S. C.

water and the pressure backward of the fresh water of a river. A verdict of guilty was accordingly entered.(a)

\*And the subject with reference to the city of London was much considered in the year 1845, as we have already shewn at [ \*46 ] length in the last Chapter.(b)

However, the King possesses certain rights in fresh rivers, as, 1st, a right of franchise, that no one should set up a ferry without prescription, or a charter, unless it be for the use of his own family. Next, an interest or pleasure, as to bar fishing or fowling for a certain time, although this prohibition was narrowed by the Great Charter to such rivers as were thus under the prerogative in the reign of Henry II. Lastly, an interest of jurisdiction, as to reform nuisances in rivers, either by a commission of sewers, or otherwise. The commission of sewers had its origin from the continued neglect of drainage.(c)

The soil beneath rivers which are not navigable, belongs, as we have already explained, to the owners of the land, on either side of the stream. These proprietors are very frequently the lords of manors, and, by prescription, they may also have a title to the soil of public rivers. Thus, it was said by Lord Chief Justice Holt, that if a river run contiguously between the land of two persons, each of them is, of common right, owner of that part of the river which is next to his land, and he may let it to the other, or to a stranger.(d) And so again, the banks, a fortiori, belong to such proprietors, together with the grass, trees, and other profits growing thereon.(e)

There is the same law with respect to lands left derelict by the recess of a navigable or other stream in rivers as in the case of a reliction by the seas, which we have discussed already.(f) And so again, with respect to alluvion, avulsion, the creation of islands, &c. We will notice each of these points in their order; and, first, with respect to lands left derelict, it is observable, that the right of property follows the nature of the stream, so that, in the case of a private river, the right to the soil will belong to the owners of the banks on each side, according to the extent and situation of the land thus relinquished.(g)

However, as upon a recess of the sea after an encroachment, land covered by it may be reclaimed if it can be identified; so \*if a [ \*47 ] stream deprive a man of his ground by making a channel, and it

(a) 2 Dougl. 441, Rex v. Smith.

(b) This subject as to the ownership of the soil, especially between high and low water mark, has been discussed at greater length in a note at the end of the Treatise.

(c) Hale de Jure Maris, p. 6, &c.

(d) In Rex v. Wharton, 12 Mod. 510.

(e) See Callis, p. 73.

(f) Ante, p. 29.

(g) Fleta, lib. 3, c. 2, § 10. Schultes, p. 121.

subsequently return to its ancient bed, the original ownership will not be lost, if it be satisfactorily ascertained.(h)

If a stream, by making an alluvial deposit, secretly add anything to my land, it belongs to me as my property, and Fleta calls this alluvion a silent increase.(i) So subtle, indeed, is this increase, that it is impossible to perceive at what instant of time the addition has taken place.(k) So Britton: if the increase should be such as that no one can perceive it as it advances by degrees after many years, and not in one day, nor even in a year, it belongs to him to whose soil it has attached itself.(l) So it was decided in an old case, that if water run between two lordships, the soil and the water belonging entirely to one of the lordships, and then it encroach upon that lordship to which the water does not belong, the land relict on the other side shall be his who owns the water, that is to say, if the increase be imperceptible.(m) But if this event had happened suddenly, by the force of an inundation, so as to deprive the opposite lord, whose the water was not, of part of his soil, as for instance, if part of the opposite shore were divided impetuously, and forced upon the land of the other lordship, in this case the soil thus formed should not be divested out of its original proprietor.(n) For Fleta writes, that if the force of a river should detach any part of your field, and increase that of your neighbour, surely it shall, nevertheless, continue yours, this being not a secret, but a manifest accession.(o) But if it remain so long attached to the soil of your neighbour, as to draw thither trees which have taken root in his land, these trees shall continue to be his property,(p) according to the principle, that trees belong to that person in whose land they are first sown or planted.(q)

This forcible dis severing of land and adhesion to the property of another, is called avulsion.

Nevertheless, Lord Hale observes, that the case may be altered by a special custom. For example, the Severn below Gloucester Bridge is the common boundary of the manors on either side, whatever course the river may take.(r)

[\*48] But further, islands may appear in rivers, and, indeed, the creation of these new properties is more frequent in rivers than in the sea, because of the great depth of the sea, and the ebbing and flowing of the tides there.(s) In determining the property of islands in rivers, it is desirable to consider the principle, that the estate of each owner extends to the middle of the stream *ad medium filum aquæ*. Therefore, if an island, or eyot, arise in the midst of a river, it shall be common to the proprietors of land on either side, according to its breadth near the banks.(t) And this means, that if it should be nearer to one

(h) Schultes, p. 122.

(i) Fleta, lib. 3, c. 2, § 6.

(m) 22 Ass. pl. 93.

(o) Fleta, lib. 3, c. 2, § 6.

(s) See Moo. & Malk. 112, Hqlder v. Coates.

(t) Schultes, 117.

(k) Ibid.

(n) Ibid.

(l) De Purchas, fol. 86.

(r) Hale de Jure Maris, p. 6.

(p) Ibid.

(r) Hale de Jure Maris, p. 6.

(t) Fleta, lib. 3, c. 2, § 6.

side than the other, the greater part will consequently belong to him whose possessions are the nearest.<sup>(u)</sup> Thus it becomes necessary to take into consideration the vicinity or remoteness of the island from the main land.<sup>(v)</sup> Further, supposing that another island should arise between an island already risen on one side of the stream, and which belongs wholly to the estate which it adjoins, and the opposite banks, it is declared, that the admeasurement of property in the new eyot shall be made from the first, and not from the shore to which it belongs.<sup>(w)</sup> And if the island should be round, the same rule is adopted, the proprietor of each bank acquiring so much as may be nearest to the soil. Yet, sometimes the whole of the river belongs to one seignior or manor, and in that case, it seems clear that the property in an island would pertain entirely to one person, namely, the lord of that soil over which the river should happen to flow.<sup>(x)</sup>

However, notwithstanding this rule, it has been remarked, that some persons claiming several fishery, have asserted a right to islands or eyots risen up in rivers, although the adjacent banks on both sides belonged to other individuals. The claim, it seems, was made on this principle, that ownership of the soil followed the several fishery as of common right. If the soil of the fishery itself had been granted in such cases, this demand could not certainly have been resisted, but in the absence of any such grant the property would be vested in the owners of the adjacent shores. Supposing the doctrine to be true, (of which, as we shall see hereafter, there is much reason to doubt the negative of that proposition having been almost decided,) that a several fishery cannot exist without the soil, the claimants upon this occasion must have mistaken the nature of their right.<sup>(y)</sup>

Such are the *fluvialia incrementa*, or accessions of rivers, together\* with the legal ownership of each;<sup>(z)</sup> and with regard [ \*49 ] to the mode of claiming the respective rights alluded to in this Chapter, the reader is referred back to the second Chapter, where he will find the course which is to be pursued where rights in the sea are claimed. The same law is applicable to the case of rights in public rivers.

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#### \*CHAPTER IV.

[ \*50 ]

##### OF CANALS—DOCKS—WATERWORKS, ETC.

MANY of the points relating to canals will be discussed in a subsequent part of this Treatise, such, for example, as the liability to contribute to

(u) Fleta, lib. 3, c. 2, § 6.

(v) Id. § 8.

(w) Id. Ibid.

(z) See 2 Comm. 261.

(y) See Schultes, 97.

(x) As to the reasons for considering the Crown to be the proprietor of the soil of navigable rivers. See Schultes, p. 128.

the payment of rates, the subject of toll, and other matters. Canals are for the most part regulated by the respective acts of Parliament which have constituted the companies generally known by the name of "Canal Companies," and these acts are, of course, numerous and diversified, so as to preclude a separate mention of each in a general work. But there are, nevertheless, some common rules which govern construction of statutes which concern canals, and, occasionally, decisions have taken place upon particular clauses, of which it may be desirable that the reader should be informed. Thus, in the first place disputes respecting calls for the amount of subscriptions due on shares are regulated and settled by Courts of law upon principles which have reference to that particular subject. So again, the limitation of actions against the proprietors of canal shares, &c., the liability of such proprietors, &c., for injuries done under their management, with other such matters, come at times under the consideration of the Courts, either upon the principles of law generally, or upon the construction of real special act of the Legislature.

An action on the case *in tort* was brought by the Huddersfield Canal Company for several sums which it was alleged the defendant had subscribed towards making and maintaining the Huddersfield Canal. By the act of Parliament which incorporated the subscribers, the shares were declared to be vested in such subscribers, their executors and assigns, and the proprietors were enabled to sell their shares, the purchasers being thereafter entitled to have shares in the profits. Power also was given to a committee to make calls for money on the proprietors, and an action of debt, or on the case, was given as a remedy in cases of default. The defendant had been possessed of eight shares, but he sold five of them, and duly transferred his interest therein. The breach stated in the declaration was, that although the defendant had paid his proportion in respect to three shares, "(the three which he still held), he had not paid in [ \*51 ] respect to the five others, which he had also subscribed for. The defendant objected, that he was not liable to further calls after the assignment, and upon a special case the Court were of the same opinion, as it was clear that the Legislature meant that the parties should be liable only as long as they continued individually to be members of the company. The act vested the property sold in the assigns of the vendor, and it would be ridiculous to determine, that a person, after he has sold his shares in respect of possessing which only he became a proprietor, should still continue to be a proprietor. It would be strange to say, that after disposing of the shares, the seller, should still continue liable to all the burdens which are thrown on the owners of the property. But the Court held, that an action on the case would lie, for the words of the act, they said, were general, and, therefore, the form of the action being deemed correct, the postea was delivered to the plaintiffs, because interest on a sum acknowledged to be due by the payment of money into Court, had not also been paid.(a)

(a) 7 Term Rep. 36, *The Huddersfield Canal Company v. Buckley*. There are numerous decisions concerning the liabilities of railway shareholders, which, of course, do not belong to this Treatise.



An act gave permission to sue for tolls in debt or action on the case.

Assumpsit was brought, and it was objected that the action ought to have been in tort, but the Court said that any form of action on the case was intended.(b)

There was a power for a land company to raise money upon the security of the canal and dues. By the form of the deed, the canal and the dues were assigned to the lenders as a security for the principal, the interest upon which was to be paid half-yearly. It was held, that *covenant* would not lie for this interest.(c) By a Navigation Act, commissioners were authorized to appoint a clerk, and his allowance was to be paid by the proprietors of tolls. By another section, an action of debt with double costs of suit,(d) was given after demand and refusal, and the action was to be brought in the name of the clerk. It was held, that no action could be brought on the former section only, and that although the declaration omitted to state an actual demand, an action on the statute must be taken to be founded on the two sections conjointly, and therefore that the plaintiff "having recovered under nil debet, pleaded, [ \*52 ] was entitled to double costs,(e) though the declaration omitted to state the demand.(f) A person who entered into the receipt of tolls appointed a collector, and represented himself to the commissioners as a mortgagee of the tolls, and as having a contract generally over a river navigation, was held to be a proprietor, so as to be liable to the payment of the salary to the clerk. It was held to make no difference that he only held the tolls in trust to pay creditors and discharge incumbrances, and that there was an outstanding term for the purpose of securing annuities.(g)

Upon another occasion, it was holden, that the administrator of a subscriber to a projected canal could not be sued for calls, the party proposing to subscribe having died before the passing of the Canal Act. The action was brought in debt, and it appeared at the trial, that the intended subscriber died, as is before mentioned, that letters of administration were granted to the defendant and others, and that the defendant paid a certain deposit on the shares to the bankers of the subscribers. But the defendant paid no money subsequently to the passing of the act. The receipt for the deposit was given to the defendant in the name of the party deceased; although wishing himself to be an adventurer in the

(b) 2 Nev. & Man. 834, *Corbett v. Carpmael*; and see note (b), *id.* 835.

(c) 3 Bing. N. C. 433, *Pontet v. Basingstoke Canal Company*. S. C. 3 Scott, 182.

(d) But double costs are now treated only as single costs, 5 & 6 Vict. c. 97.

(e) See *supra*.

(f) 5 Nev. & M. 609, *Tibbits v. Yorke*.

(g) 5 B. & Adol. 605, *Tibbits v. Yorke*. In this case certain notices appeared to be necessary under an act to be given in the Northampton and Cambridge newspapers. One newspaper was at that time published at each place. A newspaper was subsequently established, called "The Huntingdon, Bedford and Peterborough Gazette, and Cambridge and Hertford Independent Press." Amongst other places it was published at Cambridge. It was held, that publication in the former papers was sufficient.

scheme, he had requested that it should be given in his own name. The defendant sold the shares afterwards to a person who, not liking the speculation, treated the purchase as a nullity, as not having been effected according to the forms prescribed by the act, and the canal company made a call upon the defendant, in his individual capacity, for money due upon these shares, treating his sale as void for want of compliance with the above forms. It was insisted, that the defendant was not chargeable, for he was not an original subscriber, nor a person advancing money towards the shares in his own right, his request to have the receipt in his own name not having been complied with; nor had he been personally admitted as a proprietor. A verdict having been found for the plaintiffs, it was moved to set aside the verdict, and a nonsuit was subsequently entered, the Court being of opinion that the action could not be maintained. The defendant neither filled \*the character of any sub-  
 [\*58] scriber named in the act, nor of any who had subscribed since the act passed. When the receipt in the name of the deceased person was tendered to the defendant, he might have objected, and might have desired to have his money back, but, instead of that, he kept the receipt, and thus acquiesced in the share as administrator. Had the company intended to charge him as administrator, the mode of doing so was pointed out by the act, namely, to give the shares to another, in case of the defendant's refusal to pay, or of want of assets; or to declare them forfeited; for the act indemnified executors and administrators paying calls upon the shares of deceased persons. Had the undertaking proved profitable, the defendant must have been accountable to the effects of his intestate for the proceeds, and the plaintiffs consequently should have sued him, *if at all*, as administrator. (h)

The Company of the Norwich and Lowestoft Navigation brought an action for the amount of calls before the whole capital mentioned in the act had been subscribed. The act provided that the subscription should be full before any calls were made, and it was objected that the statutory provision had been violated. Of this opinion was the Court, and the plaintiffs were nonsuited. (i) The meaning of the word "subscriber" underwent some consideration in a late case. An action was brought to recover the amount of two calls. The defendant had applied for eight shares in the intended capital of the Thames Tunnel Company, and the number of shares was set against his name, and he then gave a check for the deposit, and took a receipt. He, however, never signed the contract under the act subsequently passed for incorporating the company, although a space was left opposite to his name for the purpose of his seal and signature. The Court held, that he was not liable; for the word "subscriber" in the act applied to those only who had stipulated to make a

(h) 5 Taunt. 801, *The Weald of Kent Canal Company v. Robinson*.

(i) Moo. & Malk. 151. *The company of proprietors of the Norwich and Lowestoft Navigation v. Theobald*. As to the evidence in cases respecting calls. See post, Chap. XIII.

payment, and not merely to such as had made a payment. Judgment was therefore given for the defendant.(k)

Power was given to make a canal and railroad. Disputes were to be settled by a jury. A dispute having arisen, the verdict was, value of land 6*l*.; present damage and future damage 2800*l*. The undertakers not having as yet occasioned any injury, it was held that the verdict for future damages could not be supported, and that they might at any [ \*54 ] period within the \*time allowed them to complete their works, take the land to them.(l) An objection in equity to a notice to purchase, in a suit between the same parties, was held untenable. They had deviated from the Parliamentary line, but the alteration had worked no injury. They had ten years remaining before their time of expiry for the completion of the works would end, and no intention to abandon the line appeared ever to have existed.(m)

By an act for improving a navigation the company were empowered to buy lands, and there were the usual compensation clauses. Certain titheable lands having been taken for the purposes of the act, it was held, that the tithe owner was not entitled to compensation.(n)

The liabilities of canal proprietors for injuries done by them or their servants, come also occasionally under the cognizance of the Courts; and here again, the liabilities themselves, as well as the limitation of time within which actions should be commenced are construed in general according to the provisions of the respective acts of Parliament. And so again, actions brought by such proprietors are subject to a similar construction.

And a mandamus for compensation will not be granted against them after the lapse of a reasonable time, especially if there be another remedy by ejectment. Thirteen years having elapsed, the Court refused a rule.(o)

The following reservation was made in a canal act:(p) Provided, that nothing in this act contained shall entitle the company, on purchasing any lands for making the canals to any mines of coal, &c., which shall be found in cutting, or shall be under the same, but that all such mines shall belong to such persons as would have been entitled to the same in case this act had not been made. But another section declared, that as often as the owner of any mine of coal, &c., lying under or within the distance before limited from the said canal, should be desirous of working the same, (such distance having been fixed by a previous section at ten yards' distance of the canal,) that then the owner should give notice in

(k) 6 B. & C. 341, *The Thames Tunnel Company v. Sheldon*.

(l) 2 Mees. & W. 824, *Lee v. Milner*.

(m) 2 Y. & Col. 611, *Lee v. Milner*, Injunction.

(n) 9 B. & C. 875, *R. v. Commissioners of the Nene Outfall*. S. C. 4 M. & R. 647.

(o) 1 M. & S. 32, *R. v. Stainforth Canal Company*.

(p) 32 G. 3, c. 80.

[ \*55 ] writing under his hand of such intention, to the clerk of the company, at least three calendar \*months before he should begin to work the mine. Upon the receipt of the notice, it should be lawful for the company to inspect the mine, in order to determine what coal, &c., might be got without prejudice to the canal, and upon refusal or neglect of the company to inspect within thirty-one days after notice, the owner of the mine might work such part of it as lay under the canal, or within the distance aforesaid, &c. It became desirable for the defendants to work their mine within the given distance of the canal, and they accordingly gave notice of their intention to the company, who, after sending persons to examine the plan, declined purchasing the rights of the defendants. The defendant then continued working till a partial damage occurred by reason of the sides and bottom of the canal giving way. Upon this an action on the case was brought against the defendants. But the learned Judge nonsuited the plaintiffs at the trial, conceiving that the Legislature had left to the owners of the lands the entire dominion and benefit of their property, and that it had been the fault of the defendants not to purchase the rights tendered to them for sale. It was contended, however, upon a motion for a new trial, that the act did not authorize these owners of mines to work at all hazards, but only, as in other cases, at their own discretion and peril. And the counsel for the plaintiffs urged a case which, he said, had been tried by the same learned Judge (Lawrence, J.) under similar circumstances, though under a different act of Parliament, when the company had obtained a verdict.(g) Mr. Justice Lawrence said, that he had no distinct recollection of the former case, but that unless the act of Parliament in that case was very different from the present, he thought his former opinion not so well founded as upon this occasion. And the Court entertained the same impression, considering the coal owners to have been left to their common law rights, as if no canal had been made, so that they might take away every part of their coal in the same manner as they might have done before the act had passed. And this case, they added, was not like that where damages were recovered against Lord Lonsdale, for undermining a person's house, since there the party claimed under a grant from the owner of the land, and the injury done was against the landowner's own grant.(r)

By an act, a canal company were bound to repair the banks of a canal. In an action brought by the company against the owner of some adjoining land for digging clay pits upon some of his own land, and causing the plaintiffs' bank to give way, there was \*some evidence to shew [ \*56 ] that the banks were not in good repair; but the jury were directed to find for the plaintiff if they thought that the falling in of the bank was caused by the digging of the clay pits. It was held that the plain-

(g) 7 East, 371, Birmingham Canal Company v. Hawkesford, cited by Dauncey, *arg.*

(r) Id. 368, The Company of Proprietors of the Wyrly and Essington Canal Navigation v. Bradley and others. See also 5 B. & C. 821, Finch v. Birmingham Canal Company, and post, Chap. XI.

tiffs were not entitled to recover, unless at the time when the bank gave way it was in good repair; and as that question had not been submitted to the jury the Court granted a new trial.(s)

A canal act provided, that no owner of any mines should carry on any work for the getting of any coals or minerals within twelve yards from the canal, or any reservoir to be made for the company; nor should any coals or other minerals be got under any part of the canal or towing path thereunto belonging, or any such reservoir, or under any land or ground lying within the distance of twelve yards from either side of the canal, or any reservoir, &c., except as hereafter mentioned, without the consent of the company. Another clause provided, that where the owner of any coal mine, &c., lying under the canal, towing path, reservoir, &c., or within the distance thereafter limited, should be desirous of working the same, such owner should give three months' notice to the company, upon which the company might inspect the mines in order to see that no prejudice might be done to the canal. Upon a neglect on the part of the company to inspect the mines for thirty days after notice, the owner of the mines might work them under the above conditions, and then if the company refused to suffer the owners to work the mines they had come at, the company were to pay the value thereof to the owner within three months. By another clause, the right of the owner of land through which the canal passed was secured with regard to the mines, and the owners of the mines had leave to work, *provided they did no injury in working* to the said navigation. It was held, that this proviso was to be construed with some qualification, viz., either as importing that the party working the mines was to do no unnecessary damage to the navigation, or no extraordinary damage by working the mines out of the usual mode; and, therefore, where notice had been given by the lessee of a coal mine of his intention to work, and the company had not bought his right within the given period, the lessee was held entitled to work in the usual way, and the reservoir having been damaged by the working, that no action was maintainable by the company.(t)

If the funds of persons who are cutting a canal prove insufficient, the owner of lands through which they are cutting may, on prompt application, obtain an injunction against \*them.(u) But they cannot be [\*57] thus restrained from cutting through their own lands at a distance from the harbour, pending an application to Parliament for further powers to levy money.(v)

If an act of Parliament concede a limited protection to persons in doing something which may at one time be proper, though unjustifiable at another, such persons may be so far said to carry on their work in

(s) 6 B. & C. 317, *Staffordshire Canal Company v. Hallen*. S. C. 9 D. & Ry. 266; and see 1 B. & Adol. 874, *R. v. Trafford*.

(t) 1 B. & Adol. 50, *Dudley Canal Company v. Grasebrook*. (u) 1 Sw. 250.

(v) Id. 244, *Mayor of King's Lynn v. Pemberton*. See 9 Mees. & W. 203, *Fenton v. Trent and Mersey Navigation Company*.

pursuance of the act, as to come within the relief afforded them by the limitation of time for bringing actions, although the course they have pursued may not be borne out in its full legality. Thus by the 35 Geo. 3, c. 52, the Wiltshire and Berkshire Canal Company were empowered to make a canal, and to supply it with water from all rivers, &c., within two thousand yards from the canal. Then followed an exception of certain streams between certain periods of the year, save that if a fall of rain should occasion one of the excepted brooks to overflow its banks, the same might be taken into the canal so long as such overflowing should continue, but no longer. Then the statute proceeded to point out a limitation of time for bringing actions against the company, giving six calendar months next after the fact committed, in case of any thing done in pursuance of the act, or in the execution of its powers and authorities, or three calendar months, in case of a continuation of damages next after the doing and committing of such damage shall have ceased. The plaintiffs sued the canal company for diverting the water of the interdicted streams at a time when their banks were not overflowed, and a verdict was entered for them subject to an award. It was found, that after the passing of the above statute, and after the making of the canal, and more than six calendar months before the commencement of the action, the defendants had taken the water from the forbidden streams at the wrong period, and after the brook in question was not overflowed, and that the defendants took such water for divers long spaces of times, all of which expired more than three calendar months next before the commencement of the action. The arbitrator considered, however, that the act of the defendants had not been done in pursuance of the statute, and that, consequently, they were not protected by the limitation pointed out as to the time of suing them. But a rule having been obtained to set aside this award, on the ground that however the company might have been mistaken in their proceedings, their taking the water was yet within the general powers vested in them, the Court made it absolute. First, the company had a general power of taking water from all streams whatsoever within [ \*58 ] certain prescribed limits. Then came a \*proviso excepting certain waters, but yet containing a saving if there should happen to be an overflow. Here the company were not wholly precluded from intermeddling with these streams, but they had a kind of hazardous authority to take water thereout as long as the overflow should continue. And, moreover, the company were permitted to convey the water in its regular channel by culverts, drains, &c., if they thought necessary, even during the interdicted periods, and although there were no overflow. So that they were concerned in the conveying of the water at times when they could not take it. When, therefore, during the interdicted time they might exercise this hazardous authority, it would be but reasonable that they should be protected so far in *prosequendo* as to be considered within the act, although in other respects they might be liable for acting in contravention of it. And Lord Ellenborough mentioned also an opinion of Lord Kenyon, as in point, namely, that if a person do not act within the limits of his official authority, but exercise that authority improperly, or abuse the discretion intrusted to him, he would be within the protection of a

statute giving a protection similar to the present. The award was consequently set aside.(w)

A canal company took land from a tenant, making compensation, but they misrepresented facts to the tenant. It was held that the company were, nevertheless, protected by the limitation clause because, in spite of their bad faith, their act was done by virtue of the act of Parliament.(x)

By 4 & 5 Vict. c. cxiii. trustees were appointed to drain certain fens. Powers over engines and sewerages were given them, provided they did not meddle with any of the works of the Black Sluice Commissioners. They were likewise authorized to improve the drainage. They had purchased a piece of land up to the margin of the drain. It was held, that although it would be to improve the drainage, yet these trustees could not widen a drain under the control of the Black River Commissioners from the width of eighteen to forty feet for the purpose of a reservoir, thereby cutting away three acres of land under the control of the Black River Commissioners, and this although the improvement could not be made without the interference complained of.(y)

By the Glamorganshire Canal Act, it was declared, that if any suit, &c., should be brought against any person for any thing done in pursuance of the act, it should be brought within six \*calendar months [ \*59 ] after the fact committed; or, in case there should be a continuation of damage, within six calendar months after the cessation of the damage. The plaintiff sued the company for damages in consequence of a want of water during 1825 for about nine weeks, and during 1826 for about seventeen weeks. The defendants insisted, first, on the dryness of the season, and next, contended that damages could only be recovered within six months next before the commencement of the action. The jury found, that there had been a wilful waste of water in the management of the canal, and assessed damages for the plaintiff (who, it was admitted, was entitled to all the surplus water,) at 577*l.* for the whole period, and at 172*l.* for six months damage next preceding the action. A rule having been obtained to reduce the verdict to a smaller sum, it was urged, in opposition to the rule, that the wilful conduct of the defendants had excluded them from the protection of the act, that the cause of action was not an act committed, and that there had been a continuation of damage. But the Court held, that the defendants were within the statute, and that the damage had ceased at one time so as to create the operation of the limitation clause, and the rule was consequently made absolute; but they gave no opinion whether an omission would be within the clause, because they considered the insufficiency of a weir made under

(w) M. & S. 580, Gaby v. the Wilts. and Berks. Canal Company.

(x) 5 B. & Ad. 138, Lord Oakley v. Kensington Canal Company.

(y) 10 Mees. & W. 378. 2 Railw. Cas. 877, Smith v. Bell. An injunction had been previously granted till the right should be tried at law. 2 Railw. Cas. 782. Caswall v. Bell. An application to vary this injunction was subsequently made by the defendant; but refused with costs. Id. 888.

the authority of the act to be a legitimate ground of complaint, that being in fact done by the company, and so improperly done as to work an injury to the plaintiff.(z)

The following is a summary of the second trial which took place between these parties. By a Canal Act (30 Geo. 3, c. 82, s. 7,) the owners of certain works, called the Pentrych Works, were entitled to all the surplus water, or such as was not wanted for the purposes of the canal. By a subsequent act (36 Geo. 3, c. 69), the canal company were required to finish the canal, and all the works and extension of the same, within the space of two years, and were restricted from making any alterations in the canal after the expiration of that time. After the expiration of two years, the canal company erected an engine for the purpose of forcing up the water into the canal, by which the quantity of water was increased, and the company were enabled to pass down a greater number of barges than could have been passed down before the erection of the engine. It was held, that this having had the effect of diminishing the quantity of surplus water, in consequence of the increased trade, was an injury to the owners of the Pentrych Works, for which they were entitled \*to recover consequential damages. The 30 Geo. 3, c. 82, [\*60] s. 7, also provided, for the purpose of better securing the surplus water for the benefit of the Pentrych Works, that the lock which should be made below and nearest to the Pentrych Works should always be kept in good and sufficient repair by the canal company, for the purpose of preventing leakage or waste of water, &c. The canal company constructed a notch for the purpose of conveying water below the lock directed to be kept in repair. It was held, on the construction of this section,(a) that the company had no right to pass any water below the lock, though necessary to the lower part of the canal, except that which necessarily passed by barges being lowered through the lock, and that the notch was not authorized by the act of Parliament.(b) By an act of Parliament a company was established for making and maintaining certain docks in the Thames, with power to appoint a dock master, who was to direct the mooring, unmooring, &c., of all vessels in the docks, &c. The act moreover provided, that if any action should be brought against any person *for any thing done in pursuance thereof*, it should be commenced within six months after the fact committed. An action was brought against the treasurer for an injury done to a vessel by reason of improper directions on the part of the dock master. It was held, that this was within the statute, and that the action ought to have been brought within six months.(c)

Again, B. mortgaged to A. certain coal mines and barges. B. demised the mines, and assigned the barges to C. The Swansea Canal

(z) 3 Y & J. 60, Blakemore v. The Glamorganshire Canal Company. Judgment affirmed in the House of Lords. Cl. & Fin. 262.

(a) See as to the Writ of Certiorari, 3 Nev. & M. 802, R. v. West Riding Justices.

(b) 2 Cr., M. & R. 133, Blakemore v. Glamorganshire Canal Company.

(c) 10 B. & C. 277, Smith v. Shaw, Treasurer, &c.



Company seized the barges, together with the coals and culm, and one question was, whether the action was brought in time. The plaintiff, who was the administrator of the mortgagee, sued more than six months after the seizure, but within six months from the sale of these goods. The clause of limitation restricted the bringing of actions to six months. The Court held, that the time should be computed from the time of sale. Had the action been brought by the mortgagor's lessee, being in possession of the property, the time ought probably to have been calculated from the time of the seizure.<sup>(d)</sup> But here no injury was sustained by the plaintiff, whilst the goods were in the possession of another. When they were sold, they were placed beyond his reach, and put into the possession of the defendants at a time when the plaintiff was entitled to the possession of them. The following points were likewise ruled: 1st, that trover would lie by the administrator against the party who seized the barges; 2ndly, that under a clause giving the company toll [\*61] for goods carried along the canal, and enabling them to seize goods or other things, and the boat, laden therewith, and detain the same until payment, and then sell the goods if not redeemed, it was not competent for the company to sell the boats; and 3rdly, that they could not sell goods after they had been landed. There were two other questions upon the Bankrupt Act which were decided for the plaintiff, as to whether the defendants, being wrong doers, could set up the *jus tertii*. Again, it was held, that a distress was a thing done in pursuance of the act; and under a clause enabling a canal company to demand and sue for certain tolls upon the carriage of goods, it was also held, that trams could not be distrained for arrears of tolls due from the owners for goods carried in them, if they were not actually carrying the goods of the owners at the time of the distress.<sup>(e)</sup>

A railway company were authorized to alter the course of a canal, but they were to pay so much as liquidated damages, to be recovered by action of debt, for their obstruction as long as it lasted. The time for bringing actions for any thing done was limited to six months next after the act committed. It was held, that the time began to run, not from the demand and non-payment of the penalties, but from the time of the last obstruction of the canal.<sup>(f)</sup>

On the same principle, a notice of action given to the proprietors of a canal company will protect them, although they may have deviated from the prescribed line of their canal. And it was so held in trespass against the engineer, solicitor, and others, employed by the Regent's Canal Company.<sup>(g)</sup> Where a particular jurisdiction was named under a canal act for the purpose of determining all questions under the act, still an ag-

(d) See 2 H. Bl. 14, *Godin v. Ferris*. 1 Bing. 109, *Crook v. McTavish*.

(e) 1 Ad. & El. 354, *Fraser v. Swansea Canal Company*. S. C. 3 Nev. & M. 391. S. P. 1 Ad. & El. 372, *Jenkins v. Cooke*.

(f) 7 Q. B. 824, *Kennet and Avon Canal Company v. Great Western Railway Company*. S. C. 4 Railw. Cas. 90. 14 L. J., Q. B. 325.

(g) 2 Price, 126, *Agar v. Morgan and others*.

grieved individual was held not to be confined to that jurisdiction, where the canal proprietors had done something not warranted by the act. For the company not having acted in exact conformity to the act, were not acting in pursuance or execution of it, so as to restrain the injured party within the particular jurisdiction. Lord Eldon thought also, in this case, that though a person, by looking on while the damage he complained of was committed, lost his claim to an injunction, he might yet sue the company at law for damages, though probably such damages would, under the circumstances, be merely nominal. The cause was remitted.(A)

Again, the Court of Chancery will not appoint a receiver on the behalf \*of private shareholders, because the company have done [ \*62 ] something not warranted by the act. Thus, where certain commissioners of a canal agreed to let the tolls in a manner not authorized by the statute which gave them their jurisdiction, and which was moreover prejudicial to the public, inasmuch as a longer term was granted than the act permitted, the Lord Chancellor observed, that as there had been an acquiescence for forty-seven years on the part of the shareholders, he could not interfere. The lessee had resided undisturbed in his possession of the tolls, and it would be unjust to molest him after so long an enjoyment so peaceably allowed. His Honor, the Vice Chancellor, having made an order appointing a receiver, Lord Eldon discharged it.(†)

From hence, it is not improbable that we may infer, 1st, that the agreement could not have been impeached by the shareholders after so long an acquiescence on their own private account; nor, 2ndly, on behalf of the public, it being admitted that the public interest was not bound.(k)

But here it is worthy of observation, that protections of this or any other description must be available under the statute, for unless they can be clearly discovered there, the common law will not help against mistake or accident. And so it is in the case of a defective title, or a title defectively made out: in the former case a company are seldom relieved, because a clause making sure a bad title is rarely found, but it is the practice of every framer of these acts to insert a provision, that no defect in the conveyance shall vitiate the transfer. An action was brought against an auctioneer for money had and received. It was for a deposit paid by the plaintiff on the purchase of a piece of land near Paddington, from the Grand Junction Canal Company. It was allowed at the trial, that as between two individuals the title would have been defective; but it was contended, that the act for establishing the Grand Junction Canal Company had cured the defect. The provisions cited were, that the company might buy land for the working of the canal, and might resell

(A) 2 Dow. 519, Shand v. Henderson. See 6 T. R. 67, Latham v. Barber.

(†) 2 Russ. 126, Gray v. Chaplin.

(k) See the marginal note of the reporter. Ibid.

parts not wanted for that purpose; and that such sales, conveyances, and assurances should be valid and effectual in law, to all intents and purposes whatsoever. And further, that any sale and conveyance to a purchaser should be valid and effectual. But it was argued, that according to such a doctrine, all the defective or wrongful titles in England might be completely cured by being drawn through the Grand Junction Canal Company. And by Lord Ellenborough: "I must suppose that the words in the \*statutes relied upon, refer only to the mode in [\*63] which the conveyances are made, without having any operation upon the title to the subject-matter conveyed. A contrary construction would be alarming to every landholder in the kingdom."(*l*)

The acts of Parliament which enable canal companies to purchase lands, thus empower them to gain also the ownership of the soil. But they may have a possession of land, under some circumstances, without being the owners of it; as where the proprietor of the soil gives permission to a company to make erections upon it. And so the contractors for making a navigable canal have been deemed competent to maintain a trespass upon such an occasion. The plaintiffs, who had made a contract with the Portsmouth and Arundel Canal Company, brought an action for breaking and entering a cut or watercourse belonging to them; and the only question was, whether they had such an interest in the land as to enable them to sue in trespass. It appeared, that in the course of performing their contract they had erected a dam upon the locus in quo, by permission of the owner of the soil. It had been repaired by them since its erection. A verdict having passed for the plaintiffs, the objection was resumed, upon motion in the Court of King's Bench to enter a nonsuit, or have a new trial; but the Court refused the rule; for the dam had been erected by the plaintiffs at their own expense, and with their own materials, and with the consent of the owner of the soil, for a special purpose. Until the completion of that purpose, the plaintiffs were entitled to the possession of the dam. A person in possession, whether rightfully or wrongfully, being entitled to sue a mere wrong doer, the plaintiffs might recover in this action. And had they any other, indeed, than a partial or subordinate interest in the dam, trespass was the proper remedy. Here then was not a mere right to enter upon the locus in quo, but an absolute occupation of it, with license.(*m*)

But whether the ownership or occupation of the soil be thus acquired, depends mainly upon the respective acts of Parliament. Certain persons were authorized to make the river Itchen navigable, to cut and make new channels, &c., and, in fact, to do all that was fit for navigation. But they were not to make any trench, &c. without a full agreement with the owner of the land, and satisfaction made him. By a subsequent clause, certain commissioners were authorized to determine the

(*l*) 3 Camph. 284, Ward v. Scott.

(*m*) 5 B. & A. 600, Dyson and another v. Collick. S. C. 1 D. & R. 225.

amount of the compensation, in case the undertakers should not have done so. The owner of the adjoining land having cut some trees and bushes upon the bank of a channel made under the act, the [\*64] proprietor of the navigation brought trespass. The Court held, that the action would not lie in this case, and that the proprietor did not necessarily acquire an interest in the soil; and they held, moreover, that as the purchase of the soil was not necessary for the purpose of the act, the fact of such a purchase ought not to be inferred; and the improbability of such a purchase ought to have been pointed out to the jury. The plaintiff having obtained a verdict, the rule for the new trial was made absolute.(n)

Under the Duke of Bridgewater's Canal Act, 32 Geo. 2, c. 2, power was given to supply a canal with water, and to enter, for that purpose, upon the King's lands, and have all other necessary authorities for carrying out the canal. These powers were extended by subsequent statutes. About the year 1807, an opening was made from a certain pool called "Big Pool," by which the canal was fed. About the year 1840, the defendants claiming under the duke, erected some lime kilns, some of which stood on the water way over which the water of the Big Pool flowed into the canal. The whole of the land was Crown property. The lessee of the Crown brought ejectment to recover the soil covered with the Big Pool, and also that whereon the lime kilns were erected, there being no conveyance to the Duke of such soil. It was contended for the defendants, that this user of the defendants was necessary for the purposes of their canal, and, besides, that they had embanked a brook here for forty years before, and that the occupation of such water was some evidence of adverse possession. But it was said on the other hand, that a lawful user of a right of way was not an adverse possession of the land over which the way led. The Court gave judgment for the Crown. So long as the owners of land confined themselves to a just user of their powers, the Crown forebore to interfere, but as soon as the lime kilns were built,—the first decisive act by which the canal proprietors assumed a dominion of the land in contradistinction to a mere user,—the Crown treated them as trespassers; and, consequently the verdict in favour of the Crown could not be disturbed.(o)

The contracts in general must be in writing. The words "contract for, sell, and convey" require writing.(p) It thus appears that the land in question had been actually conveyed. But, perhaps, if it be left to [\*65] the jury whether a possession for \*twenty or forty years, would be a sufficient occupation, the case might be different.(q)

(n) 1 B. & C. 205, *Hollis v. Goldfinch*. As to the repair of drains by companies. See 2 Railw. Cas. 422, *Priestley v. Foulds*. S. C. 2 M. & Gr. 175; also 5 Ad. & El. 804. 8 Ad. & El. 901, *R. v. Thames and Isis Navigation*.

(o) 19 L. J., Q. B. 242, *Doe d. Reg. and Finch v. Archbishop of York and another*.

(p) 2 Bing. N. S. 483, *Doe d. Robins v. The Warwick Canal Company*.

(q) 2 Railw. Cas. 353, *Earl of Harborough v. Shardlow*. S. C. 2 Mees. & W. 87.

Canal shares are personal shares, and transmissible as such, if the act of Parliament so expresses it. Such were held to pass in that manner upon the bankruptcy of a holder, although the profit arose from land. The powers of the act, however, must be very punctually complied with.<sup>(r)</sup> They are likewise within the clause of reputed ownership, if deemed to be personal property.<sup>(s)</sup>

The rights of fishing in canals are of course incident to the soil, in the first instance, and are of that description which we shall in the next Chapter call territorial, as being identified with the ownership of the soil. But it is clearly competent for canal proprietors to let their right of fishery if they should see fit; although this is rarely done, by reason of the obstruction it would occasion to the canal navigation.

It having been declared by the Turnpike Act of 8 Geo. 4, that no trustee or commissioner of the road should have any interest or share in the making or repairing of the roads, &c., under the penalty of 100*l.*, it was enacted by 4 Geo. 4, c. 95, s. 37, that no such trustee or commissioner should be liable to that forfeiture by reason of his being only a proprietor or holder of any share in any canal or railway company which should contract with the trustees or commissioners of the road for which such person might act as a trustee, &c., for the carriage or conveyance of any materials for the repair of such road. Otherwise, it is very unsafe for a person in any way interested to take part in legal proceedings. As where the question was, whether a bridge should be erected over a certain canal. The canal committee were unfavourable to its erection, and, therefore, the matter was left to the decision of commissioners appointed under the Canal Act. The bridge, when made, would have communicated with the Aberdare and Taff Vale railways, so that the transit by the canal would be avoided. But the chairman, and others connected with the railways, acted likewise as commissioners under the Canal Act, and gave the license required to build the bridge, upon which a writ of certiorari was moved for to quash the proceedings by reason of interest; and the Court made the rule absolute. Here were several interested persons acting as commissioners. This was not an accidental intrusion of one individual who might have had an interest; and, therefore, according to the cases of *R. v. Cheltenham Commissioners* and *R. v. Herts Justices*, the objection to the decision of the commissioners was fatal. The meeting was, moreover, illegal for want of a proper calculation of the days of notice. And the Court disposed of a rule for quashing the certiorari on the ground of the proceeding being ministerial, and not judicial at the same time. They held it to be a judicial act, being done upon due inquiry; and this rule was discharged.<sup>(t)</sup>

Some cases on the subject of probate, respecting canal shares, shall

<sup>(r)</sup> 1 Deac. & Ch. 411, *Ex parte Lancashire Canal Company*. See also as to the construction of three calendar months, within which a purchase was to be made by a canal company. 10 B. & C. 349, *Tone v. Ash Conservators*.

<sup>(s)</sup> Mont. 116, *S. C.*

<sup>(t)</sup> 19 L. J., Q. B. 251, *R. v. Aberdare Canal Company*.

close this part of our subject. A motion was made for the payment into Court of the purchase-money of certain canal shares; and the question was, whether the will of the person, to whom the shares had belonged, and which had been proved in the Prerogative Court of Canterbury, should be proved in that of York also, the canal being situate in both provinces. The office where the document was kept was in London. The Lord Chancellor was of opinion that the probate obtained was sufficient; but he added, that if the parties would not be bound by his opinion, there must be a reference to the Master to settle a proper conveyance.<sup>(u)</sup> An act for making a canal from Birmingham to the Severn, near Worcester, declared the shares therein to be personal estate, and transmissible as such, and not in the nature of real estate. A subsequent act directed that the original deeds of bargain and sale or transfer of any shares, should be filed with and kept for the use of the company. The transfers of shares were filed and kept by the clerk appointed for that purpose, at Birmingham, where also the dividends were paid, the books of account kept, and the general business transacted. It appeared that the canal passed through several parishes in the diocese of Worcester, and also through the parish of Birmingham, in the diocese of Litchfield and Coventry; and that the rates and duties for tonnage and wharfage were collected at different places in each of the dioceses. W. H. having died in Birmingham, possessed of a share for 100*l.*, the transfer of which had been regularly filed at Birmingham, his executrix proved the will in the Consistory Court of the Bishop of Litchfield and Coventry; but the company refused to pay her the dividends upon the share, on the ground that she ought to have taken out a prerogative probate. It was urged, [ \*67 ] that the profits were ascertained at the head office, until which \*the proprietor had no claim, and that the deed, the evidence of the testator's title, was there at the time of his death. BY THE COURT. The right to the share of the profits is personal property, which may be considered as locally situated in Birmingham, for the purposes of probate.<sup>(v)</sup>

As we have already said on the subject of canals, many of the points relating to dock companies will be discussed in other parts of this Work. These, like canal companies, are, for the most part, incorporated by various acts of the Legislature, and their public as well as private liabilities are in general regulated by the provisions of these statutes.<sup>(vv)</sup>

They are bound to be careful in the exercise of their duties, and to exercise the powers entrusted to them in such a manner as to occasion no injury to their neighbours, or to the public. Where they are permitted

<sup>(u)</sup> 2 Wils. Ch. Ca. 166, *Smith v. Stafford*.

<sup>(v)</sup> 7 B. & C. 632, *Ex parte Horne*. S. C. 1 M. & R. 529, *nom. R. v. Worcester Canal Company*. See a case of *Robinson v. Addison*, 4 Jur. 647, where canal shares were, in that case, held to be general, and not specific legacies.

<sup>(vv)</sup> Canal and dock shares and bonds, secured by an assignment of rates, do not constitute an interest in land within the Statutes of Mortmain, 11 Beav. 367, *Walker v. Milne*, 18 L. J., *Canal*. 288.

by special enactments to invade the property of others, a compensation, regulated by a certain proportion, which we shall presently notice, is usually awarded to the owners of such property. The construction of all docks must now be in conformity with the general act upon that subject.<sup>(w)</sup> And no works on the sea shore shall be constructed without the consent of ten of the Commissioners of Woods and Forests, and of the Lords of the Admiralty.<sup>(x)</sup>

A limitation is commonly prescribed as to the time of suing such companies, in respect of any unjustifiable act which they may have committed: very frequently six calendar months after the fact in question. Upon this part of our subject a case occurred not long since, in which the doctrine of consequential damage, as it relates to the limitation of actions, came before the Court, and in which the case of *Roberts v. Read*, upon the Highway act, was recognised and approved by Lord Tenterden. It was an action against the Treasurer of the London Dock Company, to recover a compensation in damages for an injury to the plaintiff's reversion, occasioned by certain works carried on by that company, adjoining to the plaintiff's wharf. In deepening the foundation of a dock close to the wharf, the defendants had undermined a wall belonging thereto, so that every tide which brought water into the dock washed away some of the materials along\* with it, upon its return. The mischief arising from this appeared so great, that surveyors called on the part of [ \*68 ] the plaintiff, who had seen the wall in November 1822, declared it to be impossible that it should last for any length of time. In 1824 part of the wall actually fell, and the action was forthwith commenced. It was objected for the defendants, that inasmuch as the act complained of was done in 1822, and the action was not brought until 1824, the plaintiff must be nonsuited, because the London Dock Act, 39 & 40 Geo. 3, c. 47, s. 151, ordains a period of six calendar months as the time of limitation. It was answered on the other side, that this period had reference to the period when the damage happened, and not to the doing of the act. Abbott, Chief Justice, said that *Roberts v. Read* was, in point of authority, an answer to the objection, and that upon that occasion the wisdom of the common law had been interposed to prevent the injustice that might arise from too literal an adherence to the words of an act of Parliament. Another objection was pressed upon the Court. It appeared that the plaintiff's father was alive when the act was done in 1822, and that the father died in 1823; and it was urged, that the plaintiff could maintain no action except for some injury done to his reversion after he became possessed of it. But the Court as to this said, that notwithstanding the alteration of title, by the death of the father, the son might maintain the action; and the plaintiff had a verdict for a considerable sum.<sup>(g)</sup>

(w) 10 & 11 Vict. c. 27, s. 6.

(x) Id. s. 12. See this act throughout, which contains 104 sections, and is styled the Harbours, Docks, and Piers' Clauses Act, 1847. Sect. 3.

(y) Ry. & Moo. 161, *Gillon v. Boddington*. S. C. 1 C. & P. 16 East, 215, *Roberts v. Read*. 3 Y. & J. 60, *Blakemore v. Glamorganshire Canal Company*. But see the opinion of Gibbs, C. J., 1 Marsh. 437; and see also 3 B. & B. 239, *Boothby v. Morton*.

Cases of compensation for injuries done by dock companies have been adverted to. They are, of course, regulated in general by the peculiar circumstances which appear upon each occasion. Commissioners of compensation are appointed by clauses in the respective acts, whose duty it is to examine the claims tendered, and award compensation or not, as they may see fit. Should they refuse to assess a compensation, the usual course is to apply to the Court of King's Bench for a mandamus to compel them to do so.

In considering, however, the propriety of allowing this claim, commissioners would do well to ascertain whether the injury complained of is in reality a damage to private rights; and it is a good test for this purpose to be satisfied that an action would have lain before the passing of the act, at the suit of other persons than the company.

[\*69] Certain brewers in the neighbourhood of Bristol occupied premises\* for their business, which were supplied with fresh water fit for brewing from the river Avon. By means of the works and improvements authorized by the Bristol Docks Acts, especially by the damming up of the river, for the purpose of forming and floating the harbour, the water in the river at the point of communication with the pipes, became brackish and noxious, so as to render the water unfit for brewing. The applicants were ultimately compelled to abandon their premises, in consequence of this damage; and having applied to the defendants for a compensation without effect, they applied to the Court for a mandamus, for the purpose of trying their right to receive it. The Court, however, interposed an objection at the opening of the case, to which no sufficient answer was returned to their satisfaction. They asked whether the claimants could establish such an interest or easement annexed to their premises, in the water of Avon, which was a public river common to all the King's subjects, as would entitle them to compensation, under the general words of the clause; and they further inquired, whether, if any person, before the act passed, had done anything to deteriorate water of the river, these parties could have brought an action as for a private injury to their property. It being replied to these questions, that persons having acquired a right to use the waters of rivers for their own purposes, had maintained actions for the disturbance in the enjoyment of their rights, the Court said, that there were cases of special rights, where, by long enjoyment, the parties had obtained particular easements appertaining to their premises. Here, however, the injury, if any, was done to all the King's subjects, and then an indictment,<sup>(s)</sup> and not an action would be the remedy; otherwise every person who had before used the water of the river might equally claim a compensation. The rule for a mandamus was therefore refused.<sup>(a)</sup>

(s) The remedy by indictment it was admitted, was taken away by the express words of the act.

(a) 12 East, 429, *Rex v. The Directors of the Bristol Dock Company*. As to the liability of this company under the law of sewers, see Woolrych on Sewers, pp. 55, 104, 192.



A question arose upon one occasion, whether the devisee or the executor of the owner of the inheritance was to receive the compensation. No compensation was to be made until three years after the opening of the docks. After the expiration of the three years, the owner of the property in the particular case died, and the commissioners of compensation under the London Dock Acts resisted the claim of the devisee, saying, that, if at all, it could be made only by the executors. On the other hand, it was insisted, that the executor could not support a claim for an injury to the reversion and inheritance. The \*statute, in pointing out the persons entitled to this compensation, used the words, [\*70] "owners and occupiers." It was the opinion of the Court, that the devisee was entitled to his claim. To be sure, no clause provided in terms for the present case, where the owner died after the three years without having made any claim; but it must have been intended that no injury should be sustained without compensation. Then, who was the party entitled? No other person but the devisee could answer the character of owner of the land. The testatrix might have given contingent directions by her will as to the produce of the claim, if allowed, but, in absence of such a disposition, the right must be considered to have passed with the estate. The rule for a mandamus to the commissioners, was accordingly, made absolute.(b)

Then as to the criterion for estimating the yearly receipts of property diminished by the making the docks; that also must depend on the wording of the respective acts. The compensation clause of the West India Dock Act directed, that if any ware-houses, &c. used for holding West India produce before the act should be rendered less valuable by reason of the diversion of the West India trade by the intended docks, than they were before the passing of the act, &c., that then the owners of such warehouses should be compensated. The plaintiffs were the owners of a warehouse which they had used for the reception of West Indian produce, and their profits had progressively increased for many years in consequence of the increasing importation of colonial produce, and the consequent increased demand for warehouse room. This progressive advance was said to have taken place from four years before the passing of the act in 1799, till the opening of the docks in 1802. It being clear at the hearing of the case, at the Guildhall Sessions, holden before the Recorder, that the plaintiffs were entitled to some compensation, a question arose as to the time from which the average value of the premises was to be computed. The Recorder, looking to the words of the act, told the jury, not to take into their consideration any profits made *subsequent* to the passing of the act, but to confine their attention to such profits as had been made prior thereto. The jury having followed this direction, a rule was obtained to set aside the inquisition, and have a new assessment; but the Court were of opinion, that the criterion adopted by the Recorder was the right one: for if it had been allowed to calculate the subsequent

(b) 12 East, 447, Rex v. The Commissioners of Compensation under the London Dock Act.

profits, a different standard of valuation from that prescribed by the act [ \*71 ] would have been adopted, namely, a calculation of the value at \*the time of the claim, instead of the value before the passing of the act.(c)

Again, with regard to water companies; they have been incorporated by several acts of Parliament respectively applicable to each, and their duties and liabilities are likewise pointed out either by the statutes which create them, or by the principles of society at large, and by which they are of course restrained from exercising, their privileges to the injury of others. And the Waterworks' Clauses Act, 1847, which applies only to acts thereafter to be passed, is to be considered as incorporated with any such future acts, unless there be variations and exceptions therein.(d)

(c) 9 East, 166, Manning and others v. The Commissioners of Compensation under the West India Dock Act. S. C. 3 Smith, 17. See also 2 Y. & J. 152. In the matter of the St. Catharine Dock Company. Ex parte Back. That the warrants of the West India Dock Company are equally negotiable with bills of lading. See 1 Moore, 12, Zwinger v. Samuda. If the statute speaks of compensation in respect of the *estate and interest*, &c., the diminution of resort to a shop, or of thoroughfares, will not confer a claim to compensation. 5 Ad. & El. 163, R. v. London Dock Company. S. C. 6 Nev. & M. 390.

(d) 10 Vict. c. 17, s. 1. This statute contains provisions: 1. As to the construction and plans of intended works (sects. 6—15 inclusive). 2. Accommodation works (sects. 16, 17). 3. Mines and underground works (sects. 18—28 inclusive). 4. Laying of Pipes (sects. 28—34 inclusive); either by the undertakers (sects. 44, 45, 46, 47), or by the inhabitants (sects. 48—53 inclusive). 5. The supply of water (sects. 35, 36, 37). 6. Fire plugs (sects. 38—43 inclusive). 7. The protection of water (sects. 54—60 inclusive). 8. And penalties for fouling water (sects. 71—67 inclusive). 9. Rates (sects. 67—74 inclusive.) 10. Limiting the profits of the undertakers, and regulating the same (sects. 75—82 inclusive). 11. Annual accounts (sect. 83). 12. Tender of amends (sect. 84). 13. The procedure (sects. 85—89 inclusive). 14. Copies of special act (sects. 90, 91). By sect. 92, the undertakers are not to be exempt from the provisions of 57 Geo. 3, c. xxix., an act for paving and improving the metropolis, nor from the laws of sewers for the time being in force within ten miles from the Royal Exchange. By sect. 93, such undertakers shall not be exempted from any general act concerning waterworks, nor from any act for improving the sanitary condition of towns and populous districts, whether passed in the same session as the special act, or in any future session. By 11 & 12 Vict. c. 63 (an act for promoting the public health), s. 10, no provisional or other order shall issue from the Board of Health to affect any district where there may be a local act under which a waterworks company\* may construct waterworks† or supply water for their own profit, without the consent of such company, first had and obtained. By sect. 19, no proprietor, shareholder, or member of any waterworks company, or similar concerns, shall be disabled from acting as a member of the Local Board of Health, by reason of any contract entered into between such company or concern and such board. But by sect. 71, the local board may require alterations to be made in waterworks, especially with reference to pipes, mains, and plugs, provided that no permanent injury be done to such pipes, &c. or works. Again, by sect. 75, the local board may provide supplies of water, and even erect waterworks, but if any waterworks company within their district be able and willing to lay on water proper and sufficient for all reasonable purposes, and upon reasonable terms, the local board may not construct such works. Should any dispute arise between the board and the company, it shall be settled by arbitration. See sect. 123, &c.) Penalties for injuring waterworks belonging to the local board are ordained by the 79th section; and by sect. 80, penalties are provided in case any streams, reservoir, &c. belonging to the board

\*See the Interpretation Clause, sect. 2.

† See sect. 2.

\*The East London Waterworks Company were empowered by an act of Parliament to break up the soil and pavement of roads, [ \*72 ] highways, footways, &c., provided that they should not enter any private lands without the consent of the owner. It was held that the company could not enter a field belonging to the plaintiff, over which there was a common foot-path, for the purpose of laying down their pipes. The words, "highways and footways," had reference to public rights only, according to the principle, *noscitur a sociis*; and besides this, there was an express reservation in the 34th section of the act(e) of private rights, for there it was declared, that the company should not invade the property of individuals without leave.(f)

An act of Parliament enabled the directors of a water company to make "contracts, agreements, and bargains with the workmen, agents, undertakers, and other persons engaged in the undertaking." The company entered into a contract for the supply of pipes, which was not under seal, and having sued the defendants for the delivery of these pipes, and gained a verdict it was moved to enter a nonsuit, because this body, being a corporation, could not depart from the usual custom, namely, that their contracts should be by deed. And the Court were of that opinion, holding, that the words of the statute only enabled the directors to regulate the internal concerns of the company without calling all the members together.(g)

If a water company will deviate from their Parliamentary line, they will be answerable although the property injured lies out of the line.(h)

\*Premises were vested in the Hull Delivery Company for the purposes of an act, and it was provided, that all goods *landed or* [ \*73 ] *discharged* upon any of the quays or wharfs erected by virtue of the act should be liable to pay rates of wharfage. The Court held, that the company had no common law right to a compensation in respect of their premises, and that the statute did not give them any right to claim a passage for goods *shipped off* from their quays.(i)

With regard to the liability of these companies for injuries occasioned by negligence, Lord Ellenborough declared, in the case of the West

should be fouled by bathing, casting in rubbish, filth, &c., or by any other act tending to a similar mischief. And a provision is likewise made against the proprietors of gas works, who are forbidden under heavy penalties from using their manufacture of gas in any way so as to foul any stream or waterwork.

(e) 47 G. 3, sess. 2, c. 72. An act for better supplying with water the inhabitants of the parish of Stratford-le-Bow.

(f) 4 Bing. 448, *Scales v. Pickering*.

(g) 4 Bing. 282, *East London Waterworks Company v. Bailey*. But it seems that they might make themselves parties to a bill of exchange or a promissory note, payable more than six months from the date. 3 B. & A. 12, by Best, J., in *Broughton v. Manchester Waterworks Company*.

(h) 6 Ad. & El. 355, *R. v. Old Nottingham Waterworks Company*. S. C. 5 Nev. & M. 498.

(i) 8 B. & C. 42, *Hull Dock Company v. La Marche*.

London Waterworks Company, who were sued for the carelessness of their servants, in consequence of which a serious accident happened to the Liverpool coach, that he had no doubt of their being answerable.<sup>(k)</sup>

According to a late decision of the House of Lords, recourse may be had to the Court of Chancery, in order to compel an account from water companies. An information and bill had been filed against the corporation of Dublin, on behalf of the inhabitants of that city, which stated various acts of mismanagement and misappropriation concerning the funds arising from the payment of water-rates. These rates were payable by virtue of certain Irish acts passed in the reign of Geo. 3. It was suggested, that the corporation were trustees of these imposts for uses which were charitable in their nature, and the inhabitants prayed not only for a declaration and execution of the trust, but also for accounts of the various sums received, and an explanation of the purposes to which they had been applied. It being declared by the Legislature, that these accounts should be furnished annually to the Lord Lieutenant, in order to their being laid before Parliament; the defendants insisted, that the Court of Chancery had been thus barred of its jurisdiction; and the Court decreed, that the information should stand dismissed with costs for want of such jurisdiction. This decision, however, was appealed from, and the House of Lords reversed the judgment, holding that the trust of these rates was charitable in its nature, and that the proposed remedy against the corporation ought to have been entertained.<sup>(l)</sup>

[\*74] \*A water company cannot be compelled to supply water to an inhabitant beyond the term of his contract.<sup>(m)</sup>

The corporation of Dublin were immemorially seised of a watercourse, by which the inhabitant householders of Dublin were supplied with water. By acts of Parliament the corporation was enabled to borrow money for improvements upon the credit of the rates. It was held, that the money raised could not be applied by any bye-law to defray the expense of improvements made before the passing of the act, nor to pay officers, make compensation to the mayor, &c. It was also held, that the costs of former appeals, in which the corporation were respondents, might be

(k) 3 Camb. 403, *Matthews v. West London Waterworks Company*.

(l) 1 Bligh. N. S. 312, *The Right Hon. W. Plunkett, Att. Gen. of Ireland, Appellant, the Mayor, &c. of Dublin, Respondents*. See 1 Sw. 265, the *Att. Gen. v. Brown*. See as to the shares in *Chelsea Waterworks*, that they pass as personal property, although the will be not executed according to the provisions of the statute; 2 Y. & Col. 268, *Bligh v. Brent*. Shares in a waterworks company being declared by their act to be personal property, are subject to the law of reputed ownership. Where a bankrupt failed to disclose the fact of a mortgage of such shares to the company, and also neglected to mention the shares themselves to his creditors, it was held, that the mortgage was invalid for want of such notice, and a procedendo was ordered to issue, the commission having been, by consent, superseded, for the bankrupt's interest should have been set forth in his schedule, and his defence before the Court, that the shares were mortgaged beyond their value, was deemed insufficient. 1 De Gex, 269, *Ex parte Lawrence*.

(m) 1 Jac. & W. 358, *Weale v. West Middlesex Waterworks Company*.

given by the Court below out of the fund of the rates, though not directed by the order made on the appeal.<sup>(n)</sup> On the other hand, the water company must not be defrauded. As where a pipe was fixed at a higher level, with the knowledge of the owner of certain premises than had been agreed upon with the company. The owner was held liable in damages.<sup>(o)</sup>

An injunction was refused against the Grand Junction Waterworks Company under the following circumstances. They were about to apply to Parliament for an act to authorize them to procure a supply of water by means of an aqueduct from the Colne instead of the Thames, as authorized by the existing acts under which the company was incorporated. The Court would not restrain them.<sup>(p)</sup>

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## \*CHAPTER V.

[ \*75 ]

### OF FISHERIES.

THE kinds of fisheries mentioned in our books are five : namely, a common fishery, a several or separate fishery, a free fishery, a common of fishery, and a fishery in gross. But we shall find, in the progress of our inquiry, that these several kinds may be resolved into four, namely, a public, a several, a free, and a common of piscary.

All these rights may be respectively enjoyed in the sea, and in public navigable rivers. For, although the waters of the sea and of public rivers are the birthright of all the subjects of a sovereign, yet that must be considered as a general rule, to which there may be exceptions, and accordingly we shall find occasions upon which an individual has successfully claimed a separate and exclusive privilege in part of these (otherwise public) places. And upon the same principle, other private rights of fishery may be occasionally found to belong to persons, who, but for the immemorial custom, or ancient grant, would be trespassers upon the public. A common fishery, however, (which is obviously distinguishable from a common of fishery,) cannot, of course, be claimed in private waters ; for, if it should have happened that any line of fishery has been neglected, or left open to the public, the law will presume a grant or dedication by the owner of the soil, but will not recognise the user of the water as of common right.

Thus it follows, that in the sea and other public waters, each species of fishery may be exercised, but that in private streams, that first mentioned, namely, the common fishery, must be excluded.

(n) 9 Bligh. N. S. 395, Corporation of Dublin v. The Att. Gen.

(o) 4 C. & P. 87, West Middlesex Waterworks Company v. Suwercrop.

(p) 2 Russ. & Myl. 470, Ware v. Grand Junction Waterworks Company

It should be observed here, that confusion and difficulties have arisen in defining the precise meaning of the terms, several and free fishery; but, perhaps, it may be better to postpone the discussion upon that subject until the private rights of this nature come under our consideration, because we shall find but few instances in which a private right of monopoly in public waters\* has been maintained, and in those, the [ \*76 ] right has most frequently been considered to be a several fishery, with the ownership of the soil annexed.

We proceed, therefore, first, to consider the right of fishing in the sea, and in public navigable rivers.

Having thus assumed in what places the fish are to be taken, our inquiries may be,

I. Who may fish in the sea, &c.

II. What fish may be taken; and how they may be disposed of, as by sale, &c.

III. How they may be taken, and

IV. When the privileges may be enjoyed. Certain statutable regulations concerning particular fisheries, and also for the encouragement of fisheries in general, will be added.

With regard to the first question, it is an established principle, that the sea and navigable streams are open and common to all the King's subjects.(a) This is a general rule of practice; and whether the opinion of those writers who class this right among the *jura regalia* be preferred, or that on the other hand, of such as hold the right to be *jus publicum vel commune*, it is, nevertheless, certain, that *prima facie*, the liberty in question is general.

And although we do not profess to enter theoretically into an investigation of this subject, it cannot but be remarked, that the absence of any impost for taking the fish in this manner is a strong argument to shew, that the right under discussion was never vested exclusively in the Crown. "As a public right belonging to the people, it *prima facie* vests in the Crown, but such legal investment does not diminish the right, or counteract its exertion."(b)

But another inquiry naturally arises here, and it is this—to what extent the dominion over the sea extends on behalf of the subjects of the

(a) Bract. lib. 1, c. 12, s. 6. *Publica vero sunt omnia flumina et portus, ideoque jus piscandi omnibus commune est in portu et in fluminibus.* 8 E. 4, 18. 1 Mod. 106, 6 Mod. 73, *Warren v. Matthews.* 1 Salk. 357. Holt, 323. *Willes*, 268. 4 Burr. 2163, *Carter and another v. Murcot and another*, 3 Shep. Abr. 97.

(b) *Schultes' Aquatic Rights*, p. 15. See *Hale de Jure Maris*, p. 11.

realm. First, there may be a certain limit within \*which no stranger can intrude, so as to participate in the profits of fisheries [\*77] enjoyed within that limit; and secondly, there may be a right to take fish in places without that limit, subject to certain regulations and courtesies which are recognised among nations.

With respect to the second point, namely, the taking of fish without the limits of the British seas, it has always been considered, that the captors must in some measure accommodate themselves to the customs and courtesies of other nations. And, therefore, it is not competent for the subjects of one country to fish in those seas or rivers which are acknowledged to be under the control of another Sovereign, unless they obtain his consent prior to their undertaking.(c) And so a license is quoted from the Sovereign to the men of Holland, Zealand, and Friesland, to fish within certain limits.(d)

Moreover, the customs of other nations must be respected, even in places which are free to all the world. Thus, in the case of a particular trade which is carried on by the subjects of several countries, those of one nation cannot agree among themselves to make an alteration in their rules, and so to deprive others, who have not assented to the change, of the advantages of the old rules. Trover was brought for a whale, the half of a whale, and certain quantities of whale flesh, blubber, oil, spermaceti, and whalebone. The plaintiffs were owners of a ship employed in the southern whale fishery among the Gallipagos islands; the defendants owned another. While the captain of the plaintiff's ship was engaged in killing a whale, he struck another with a harpoon made fast by a short line or warp, to a small buoy called a droug. The fish last struck struggled for a considerable time, its course in the water being clearly marked by the droug, and then, upon a signal made by the plaintiff's captain, the master of the other ship followed and killed the fish. Having extracted the oil, and other valuable matter, he refused to allow the plaintiff to participate in any part of the capture; upon which the action was brought. It was proved, on the part of the plaintiff, that a custom had obtained universally in those seas, that whoever struck a fish with the droug should receive one-half from the party who killed it. The defendant's witnesses gave in evidence, on the other hand, that about fifteen years since, several captains of ships employed amongst the Gallipagos, (of whom one was an American), had usually agreed, that the striker of a fish with the droug should not be entitled to a share. The master of the defendant's ship \*had acceded to these terms, but the plaintiff's captain had not done so. The jury found, that by [\*78] the custom the plaintiff was entitled to half the fish, and they gave him the value of a moiety for his damages. A new trial was, however, moved for, 1st, because this was not such a custom of a particular trade as to be binding in law; 2ndly, that the verdict was contrary to the evidence of

(c) See upon this subject, Selden, *Mare Clausum*, lib. 2, c. 21.

(d) 16 Vin. Ab. 576, (B a) (16); and see *Id.* (17).

the present practice of the fishery; and 3rdly, that the dissent of the captains remitted all the parties to their common law rights. The counsel for the defendants also applied to enter a nonsuit, because the parties were tenants in common. It became unnecessary for the Court to decide upon the questions which affected the new trial, because they held the last objection fatal, and were unanimous that a nonsuit should be entered; but with regard to the custom, Lord Chief Justice Mansfield seemed to incline, that it might be difficult for the defendant to get rid of the merits of the case on the part of the plaintiffs, though he admitted that a considerable degree of doubt might be created by the change of practice. But Chambre, J., held the custom to be absolutely good, and said, that had the case rested on that ground alone, he should have been unwilling to have granted a new trial. The words of the learned Judge are worth transcribing. "There must of necessity be a custom in these things to govern the subjects of England, as well amongst themselves as in the intercourse with the subjects of other countries. The usage of Greenland is held to be obligatory not only as between British subjects, but as between them and all other nations. I remember the first case upon that usage, which was tried before Lord Mansfield, who was clear, that every person was bound by it, and said, that were it not for such a custom, there must be a sort of warfare perpetually subsisting between the adventurers, and he held it strongly binding, from the circumstance of its extending to different nations. The same necessity must prevail in the South Seas, although the fishery has not been so long in use, in order to regulate our intercourse with the French, Americans, and others who resort thither. A few persons may, by compact among themselves for a particular reason, renounce any advantages, and subject themselves to any disadvantages that they please; and this would bind all those who assented to it: but Luce was no party to this compact." (e) The rule for entering a nonsuit was made absolute. (f)

The customs in the Greenland fishery differ from the above. They have occasionally come under consideration in actions to recover the value of whale blubber, &c.; but there seems to be some discrepancy [ \*79 ] in the customs found in different cases. Thus, in a case where the whale had been struck first by a harpooner belonging to the ship of the plaintiffs, and afterwards by one of the defendants' harpooners, it was agreed by the counsel on both sides, that the following, as practised in Greenland, and settled by determination, at Guildhall, was the right custom. While the harpoon remains in the fish, *and the line continues attached to it*, and also continues in the power or management of the striker, the whale is a fast fish; and though during that time struck by a harpoon of another ship, and though she afterwards break from the first harpoon, and continue fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker, and of him alone. But if the first harpoon or line break, *or the line attached to*

(e) 1 Taunt. 248.

(f) Id. 241, *Fennings v. Lord Grenville and others*.



*the harpoon be not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it.*<sup>(g)</sup> Nevertheless, it was contended much more recently, that the custom was for the whale to continue the property of the first striker, not merely while the harpoon continued in the fish, *and the line remained attached to it*, but even, although the harpoon should have come out of the fish, *or have been detached from the line*, provided the fish be entangled in the line, and the line continue in the power or management of the striker. It appeared, that the whale was so far entangled in the rope of the first harpoon, when the second was struck, as to carry out 250 fathoms of rope, with such velocity as to endanger the burning of the rope, and upon this, L. C. J. Best said, that, if the custom, as proved, were understood to extend to all cases where the whale was so far entangled in the rope of the first striker, as that they might thereby have a reasonable expectation of securing her, he thought that it was a more reasonable custom than that in *Littledale v. Scaith*. The jury, which was special, then found for the plaintiffs.<sup>(h)</sup>

But an unsolicited and intrusive interruption, while the fish remains fast to the harpoon of the first striker, will not entitle the trespasser to the fish, although he thereby succeeded in detaching it from the first harpoon. In trover for a whale, it was proved beyond a doubt, that the fish was fast, and that while it was in that condition the boat of the defendants came up. The crew of that boat struck the fish with a lance; and they subsequently struck it with a harpoon, and thereby gained possession of it. The blow given with the lance was in no wise serviceable towards the securing of the whale; but it made the fish struggle violently,\* so as to disengage the harpoon of the plaintiffs. Whether the detaching of the plaintiffs' harpoon happened before or [ \*80 ] after the blow of the harpoon of the defendants, was not clearly ascertained. Mr. Justice Bayley told the jury to consider, 1st. Whether the harpoon of the plaintiffs was fast when the defendants struck the whale with theirs? and that if they thought not, then 2nd. Whether the plaintiffs could have secured the fish if the lance of defendants had not been used? The learned Judge held, that if a party come unsolicited, and do an act which prevents the first striker of an animal from killing it, and he then kill it himself, he kills it not for his own benefit, but for that of the first striker. The jury found, that the fish was loose at the time of the striking by the defendant's harpoon, but that it had become so in consequence of the blow given by the lance; and therefore a verdict was entered for the plaintiffs.<sup>(i)</sup>

There may be a vested right in a particular individual to exclude the public from fishing in a certain part, for example, in an arm of the

(g) 1 Taunt. 243 n., *Littledale and others v. Scaith and others*.

(h) Mood. & Malk. 58, *Hogarth and others v. Jackson and others*. S. C. 2 C. & P. 595.

(i) Mood. & Malk. 59, n., *Skinner and others v. Chapman and others*.

sea.(k)(l) And so, again, it is competent for the Crown to exclude the public from a river which is a parcel of the King's ancient inheritance; as in the case of the fishery of salmon in the river Banne, which appeared by the Pipe Rolls to be originally vested in the Crown. Here, one Sir R. M. Donel had obtained a grant from the Crown of a certain territory adjoining to the Banne river, with all fishings, &c., except three parts of the fishery of the Banne. Upon this, Sir R. petitioned the Lord Deputy that he might be put in quiet possession of the fourth part. But the Attorney General being apprised of the claim, obtained the resolution of the chief Judges who were of the Privy Council, and they considered that no part of the fishery in question had reference to the grant. For this was a piscary in gross, and the several inheritance of the Crown, and was by no means appurtenant to the lands which had been granted to Sir R. And, moreover, general words in such a grant, it was said, should never pass special royalties which belong to the Crown by virtue of its prerogative. And, lastly, although three parts only of the fishery were reserved for the Crown\* yet no such profit as that demanded could [ \*81 ] be allowed to pass by implication.(m)

The defendant pleaded to an action of trespass, that the l. i. q. was a navigable river, and also an arm of the sea, in which every subject had a right to fish. The plaintiff replied, that it was part of the manor of A. ; that Mrs. Y. was seized of that manor; and a prescription for a several fishery was alleged. Lord Mansfield observed in this case, upon a motion in arrest of judgment, that if any one would claim such a privilege exclusively, he ought to shew a right, the presumption being against him. But here said the learned Lord, the right is claimed and found. The rule was therefore discharged.(n)

So, to trespass for fishing in the plaintiff's free fishery, and also in their several fishery in Orford Haven, the defendants said, that Orford Haven had been from time immemorial an arm in the sea, in which every subject of the realm ought to have the liberty of free fishing. The plaintiffs replied that the corporation of Orford was a corporation by prescription, and also by charter granted by Queen Elizabeth, and that they had immemorially enjoyed, &c., the exclusive liberty of dredging and fishing for oysters there, at all seasonable times of the year. The Court were of opinion in this case, that there could be no doubt but that a subject might have a prescriptive right to a fishery in an arm of the sea; and judgment was

(k) Dav. Rep. 56 (a). Hale de Jure Maris, p. 18. Id. 20, case of the Abbot of Hulm.

(l) "Fishing may be of two kinds, ordinarily," says Lord Hale, viz. "the fishing with the net, which may be either as a liberty without the soil, or as a liberty arising by reason of and in concomitance with the soil, or interest or propriety of it; or otherwise it is a local fishing, that ariseth by and from the propriety of the soil. Such are gurgites, weares, fishing places, borachis, stacchis, &c." De Jure Maris, p. 18. See also p. 19, for precedents of such rights.

(m) Dav. Rep. 55. Le Case de Royal Piscarie de la Banne.

(n) 4 Burr. 2163, Carter v. Murcott.

given in their favour.(o) So, again, the plaintiff declared for an injury to his sole and several fishery, and also to his free and common of fishery, in certain parts of the River Ribble, lying within certain manors contiguous, and also in a certain part of the River Hodder. The mischief complained of was, that the defendant had erected a dam or wear across the Ribble, lower down the stream than the plaintiff's fisheries, so that salmon and other fish were prevented from coming up to the plaintiff's fisheries and spawning there. A right of fishery was proved on the plaintiff's behalf at the trial; and no objection was made to his claim, as enjoyed in a navigable river. He recovered a verdict, although the defendant insisted upon the legality of his wear.(p) Then, again, in another case, there was a replication in trespass, to the following effect: that the plaintiffs had a prescriptive right, under the persons seised in fee of the manor of Burnham, for the sole, several, and exclusive liberty and privilege of fishing for, taking, and carrying away,\* all oysters and oyster spats in and upon the several parts of the fishery mentioned in the declaration. Here, indeed, the plaintiffs, although they recovered a verdict, were ultimately unsuccessful, upon a motion for a new trial; but the right of fishery was not repudiated, but was, on the contrary, recognised by Heath, J., who said it might still pass as an appurtenance of the manor; and the ground of the plaintiff's failure was, that in the opinion of the Court, the prescription had been negatived by the evidence.(q)

The same principle applies to the taking of fish between high and low water mark. Trespass was brought for taking the plaintiff's shell fish and shells. The defendant, in reply, set up his general right to take these shells, &c., in an arm of the sea. The plaintiff then newly assigned, stating the plaintiff's closes to be "certain closes lying within the flux and reflux of the tides of the sea, in the plaintiff's manor of K." The defendant pleaded to the new assignment, a general right to take shell fish and fish shells. The plaintiff replied, traversing the general right, and the defendant demurred specially to the replication, because it traversed a matter of law. It was agreed, however, that the replication should be abandoned; and the plaintiff's counsel proceeded to argue against the plea, urging very strongly, that, although the common law of the subject to take might be established, it by no means followed that the subject might take shells thrown upon the sea shore. And the Court were of opinion, that as no authority had been cited to support the defendant's claim to take shells, they would pause before they established a general right of that kind. However, as the plaintiff had omitted to reply his exclusive right specially, it was clear that the defendant's plea was unanswerable, as far as it related to the taking of the fish only; and the Court therefore offered the defendant to amend his plea, without

(o) 4 T. R. 437, *The Mayor and Commonalty of Orford v. Richardson*.

(p) 7 East, 195, *Weld v. Hornby*.

(q) 1 Camp. 309, 311, *Rogers v. Allen and others*.

costs, by striking out his claim to the fish shells, and shaping his justification as he should be advised. The offer was accepted.(r)

The use of a capstern and windlass involves a right upon some occasions to take a toll of fish for the privilege; as where they are used to draw fishing boats up on the beach out of the sea. And indebitatus assumpsit will lie for fish so claimed.(s) Whether the capstern be used or not, makes no difference, nor does it signify that the party claiming the toll is neither owner of the cove(t) nor lord of the manor.(u)

[ \*83 ] \*Secondly, we come to inquire what fish may be taken in the sea, and in navigable rivers, by virtue of the public or private rights above alluded to.

In the outset of this inquiry, we find that whales and sturgeons are excepted out of these general privileges. They are royal fish, and, as such, belong to the King, by force of prerogative.(v)(w) These are called royal fish, in preference to all others; and as Mr. Schults expresses it, their epithet denotes their owner.(x) This right, moreover, is wholly vested in the Crown,(y) the subject having no participation in it, unless as we shall see, by special grant.

Royal fish, however, found and taken within the precincts, limits, liberties, or jurisdiction of the cinque Ports or their members, belong to the Lord Warden.(z)

It is said to be sufficient if the King have the head and the Queen the tail of a whale, but that the King by his royal privilege, shall have the whole of a sturgeon.(a)

That the right stood acknowledged at common law, before the passing of the statute of Edward 2, we find by a very early case. A whale was taken in Essex, and the Barons of the Exchequer immediately issued their precept to the sheriff to seize the animal into the King's hands; and, further, to inquire by good and lawful men of his bailiwick, whether any mischief had been done to it.(b) Then, by 17 Ed. 2, c. 11, it was declared that, the King shall have wreck of the sea throughout the realm, whales and great sturgeons taken in the sea, or elsewhere within the realm, except in certain places privileged by the King. The words "within the realm" are deserving of attention here, because they

(r) 2 B. & P. 472, Bagott v. Orr.

(s) 9 D. & R. 452, Earl of Falmouth v. Penrose.

(t) A place out of the reach of the tide.

(u) 5 Bing. 286, Lord Falmouth v. George. S. C. 2 M. & P. 457.

(v) See Bract. Brit. 27, fol. 14 and 55.

(w) Lord Hale, says "Sturgeon, porpoise, and balæra, which is usually rendered a whale." De Jure Maris, p. 43. And grampus, post, in the same page.

(x) On Aquatic Rights, p. 13.

(y) 6 Mod. 73.

(z) 2 Hagg. 439, Lord Warden, &c. v. The King.

(a) Seld. Fleta, 61.

(b) 24 Ed. 1. 37 Plowd. 315, acc.

confine the prerogative to places within the jurisdiction of the Lord High Admiral; and, consequently, the whale fisheries abroad (of which we have been speaking), are not affected by the exercise of this authority.

The latter part of the statute leads us to speak of the King's grant of these royal fish. At common law, this royal privilege according to Staundforde, might have been granted to an \*individual;(c) and it is now understood that that the right is susceptible of delegation. [ \*84 ] In the hands of a subject it is called a franchise.(d) So that in some places or districts the King might, before the statute, have delegated, restrained, or relinquished his right to royal fish to another person;(e) and since that time it is considered, that although every subject may fish with lawful nets, &c. in a navigable river, or in the sea, yet that the Crown only has a right to royal fish, and that the King alone can grant them to another.(f)

Royal fish may, accordingly, be claimed as they frequently have been, by prescription. Thus, one may prescribe to have royal fish, as porpoises, &c., found within his manor, namely, between high and low water mark.(g) Other fish belong to the first taker;(h) and so do those fish which are called royal, if they are taken in the wide sea, or out of the precinct of the seas belonging to the Crown of the land.(i)

Having thus established the King's right to whales and sturgeons taken within the realm, as royal fish, and having also explained, that it is a right which may be *granted* to a subject, it should be added, that there is a difference between these and other fish as far as the vesting of property is concerned. For fish in general being *feræ naturæ*, become the property of the first taker, and the property in such is not completed until after the caption. But the property in whales and sturgeons is vested before appropriation, and this is the distinction attendant upon the prerogative right.(j)

It is, moreover, observable, that that franchise may be in gross, or as appurtenant to an honour, manor, or hundred.(k)

These fish are excepted out of the statute of Elizabeth for the maintenance of the navy, and which provide, that no sovereign should take any sea fish of any that should take the same in any subject's shop.(m)

With the exception, therefore, of the royal fish above mentioned, \*the subjects of the realm, or private individuals may in [ \*85 ] *general*, take any fish in the sea or in public navigable rivers. But there

(c) On the King's Prerogative, cap. 11.

(d) Schultes, p. 15.

(e) Id. p. 17.

(f) 6 Mod. 73, Warren v. Matthews.

(g) 5 Rep. 107, citing 38 E. c. 35. Bro. Prerog. pl. 35, cites S. C. Co. Litt. 114 (b). Hale de Jure Maris, p. 43.

(h) 39 E. 3, 35, by Belknap.

(i) Hale de Jure Maris, 43, citing 39 E. 3, 35.

(j) Schultes, p. 17.

(k) Hale de Jure Maris, p. 54.

(m) 5 El. c. 6.

are exceptions even to this general rule. Acts of Parliament have been passed to restrain the public privilege in some cases, and especially with regard to very young fish. Thus, for the preservation of young fry in rivers and streams within the realm, it was enacted, that no person should by any means whatever, take and kill any young brood, spawn, or fry of eels, salmon, pike, or pickerel, or of any other fish, in any flood-gate pipe, at the tail of any mill, wear, or in any straits, streams, brooks, rivers fresh or salt,<sup>(n)</sup> within the realm; or take or kill any kepper<sup>(o)</sup> salmon or trout, or any shedder<sup>(o)</sup> salmon or trouts.<sup>(p)</sup> And, moreover, that no person should take and kill any pike or pickerel not being in length ten inches or more; nor any salmon less than sixteen<sup>(q)</sup> inches; nor any trout of a less length than eight inches; nor any barbel of a less length than twelve inches.<sup>(r)</sup> Anglers are excepted;<sup>(s)</sup> and so also is the taking of smelts, boches, minnies, bulheads, gudgeons, and eels.<sup>(t)</sup> The forfeiture was declared to be 20s.; together with the fish taken, and the nets, &c.;<sup>(u)</sup> but other statutes have increased the penalty for taking the *salmon*, declared that the destroying of the spawn, or fry of salmon, or any kepper or shedder salmon, or any salmon not eighteen inches or more from the eye to the extent of the middle of the tail, should be punishable by a forfeiture of 5*l.*, together with the fish and the nets, &c., half to go to the informer, half to the poor.<sup>(v)</sup>

It is also forbidden to make, erect, or set up any banks, hedges, dam, [ \*86 ] or stank, or net, across a river, whereby, the *salmon* may be taken or hindered from passing up to spawn.<sup>(w)</sup>

The offence of taking certain fish having been mentioned, we propose to show the mode of proceeding, and before what jurisdiction it must be inquired into. The statute of Elizabeth conferred this authority upon the Lord Admiral and the Mayor of London, together with all other persons who, by grant or other lawful means, ought to have the conservation or preservation of any rivers, &c. The offence was to be tried by the oaths of twelve men, or more.<sup>(x)</sup> Subsequent statutes, however, gave a sum-

(n) Including estuaries and arms of the sea. See 58 G. 3, c. 43.

(o) Old Salmon.

(p) 1 Eliz. c. 17, s. 1. 33 G. 2, c. 27, s. 13. The stat. of Eliz. was made perpetual except as to the last section by 3 Car. 1, c. 4. That section excepted the River Tweed out of the act, and rivers or waters whereof the Queen's Majesty was answered on any yearly rent or profit, and also the owners, farmers, and occupiers of the River Uske and Wyre, in Monmouthshire. With regard, however, to the Tweed, subsequent acts have been passed to regulate and improve the fisheries there. See 11 G. 3, c. 27. 15 G. 3, c. 46. 37 G. 3, c. 48. 47 G. 3, c. 29. And the Wye is expressly mentioned in 1 G. 1, stat. 2, c. 18, s. 4.

(q) Eighteen inches by a subsequent statute.

(r) 1 El. 17, s. 2.

(s) Id. s. 3.

(t) Id. s. 4. But by 33 G. 2, c. 27, s. 13, smelts taken must be full five inches in length from the nose to the utmost extent of the tail.

(u) Sect. 5.

(v) 1 G. 1, st. 2, c. 18, s. 14. The statute of G. 1, mentions expressly the following rivers:—Severn, Dee, Wye, Teame, Were, Teas, Ribble, Mersey, Dun, Air, Owse, Swaile, Calder, Wharf, Kure, Derwent, and Tresno.

(w) 1 G. 1, st. 2, c. 18, s. 14.

(x) 1 El. c. 17, s. 6. The forfeiture was to be applied to the use of the persons,

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mary conviction before a magistrate, or an action at law.(y) And, indeed, the statute of Elizabeth had declared,(z) that if the offences before mentioned were not presented in the leet within one year after the commission of them, the justices of peace at sessions, of oyer and terminer, and of assize might inquire thereof. The penalties, instead of being applied to the use of the parties convicting, are now given, half to the informer, and half to the overseers of the poor, for the use of the poor. They are to be levied by distress; or, in default, the offender is to be sent to the House of Correction, or other county prison. By 58 Geo. 3, c. 43, s. 6, these penalties may be sued for before any one or more justices for the county, shire, division, city, or place where the offender may chance to reside, or near where the offence may have been committed.

The matter is to be determined upon the oath or affirmation of one witness, or the confession of the party, the justice being empowered to administer such oath or affirmation. Then, if upon conviction, the person convicted do not forthwith pay the penalty, together with costs, to the justice, or other person authorized to receive them, in order that the sum may be distributed according to the provisions of the act, the justice may order any constable or peace officer to take the defaulter into custody and immediately grant a warrant for committing the \*individual in question to the common gaol, &c., for the place where the jus- [\*87] tice shall act, for such time as is hereinafter mentioned, unless the penalty and costs be sooner paid. Or the justice may grant a warrant to distrain for the penalty and costs; and in default of sufficient distress, or non-payment of the sum demanded, may commit the defendant to gaol for any time not exceeding four, nor less than two months, for the first offence: for a second, commit him for not more than eight, nor less than six months; and for a third, or other subsequent offences, for any time not exceeding twelve, nor less than eight months; the offender to be kept to hard labour, and be without bail or mainprize. By the seventh section of the same statute, the magistrate is empowered, information being first given upon oath against any person offending against the act, to apprehend the person charged, or to cause a summons to be served upon such person, and also to summon witnesses. Upon a neglect on the part of such person or witness to attend, the justice may then grant a warrant of apprehension, and may proceed to determine the case in a summary way. It is also provided, that no owner, farmer, or occupier of, or any person otherwise interested in any fishery or right of fishing, in any arm of the sea, river, or other such water, shall be deemed an incompe-

&c., who convicted the offender, (s. 7.) The 8th section gave lords of leets the power of inquiring concerning these offences, provided they were determined, (s. 9,) by the oaths of twelve men or more, and the penalties were to accrue to the use of the lords of leets. The 10th section imposes forfeitures upon stewards of leets neglecting to put the statute in force, and upon juries concealing any offences. The 12th section saved the right of all persons having a jurisdiction over such offences. These proceedings before the lords of leets, although fallen into disuse, are not abrogated by any subsequent enactments.

(y) 1 G. 1, st. 2, c. 18, s. 4, on view, confession, or the oath of one witness.

(z) Sect. 11.

tent witness to prove any offence committed against the act, by reason of his or her being such owner, farmer, or occupier.(a) Further, any pecuniary penalty and forfeiture imposed by the act may be recovered in a summary manner, or may be sued for and recovered, together with full costs, by the informer, to his own proper use, in any Court of record at Westminster, by action of debt, bill, plaint, or information, wherein no assign, wager of law, nor more than one imparlance shall be allowed.(b) Upon a summary conviction, the penalties are to be thus divided: one moiety is to be paid to the informer, and the other, all costs, &c., attending the prosecution and the levying and recovering of the penalty being first defrayed, to the overseer of the poor of the parish or place where the offence may have been committed.(c) The overplus of the money levied, (if any), after deducting the penalty, and all costs, &c. (which costs, &c., shall be always ascertained by the justice before whom the conviction takes place), shall be rendered back to the owner of the goods so distrained.(d) The conviction is to be certified to the general quarter sessions for the county, &c., and there filed "amongst the records.(e) [ \*88 ] The eleventh section provides, that no offender who shall be punished under the act shall be again prosecuted under any other statute, or be liable to any other punishment for the same offence. An appeal is given against the conviction. It must be to the justices of the county, &c., where the judgment has been given, at the sessions then next, or next but one. Previously, however, to entertaining this appeal, the appellant must, within ten days next after the judgment, and twenty days at least before the holding of the sessions, give and leave notice in writing of his intention at the office of the clerk of the peace, and also to the informer, either personally or at his dwelling-house. He shall also enter into a recognizance before the justice, in such sum, not exceeding 20*l.*, as the justice shall think fit; the condition being to try the appeal, and likewise to pay the costs, within ten days after the determination, in case judgment be given against him. The justices, upon due proof of the notice, shall determine the appeal in a summary way, and shall award costs, in their discretion, to the successful party. If the costs so awarded be not paid within ten days, they may then be levied by distress of the goods of the person ordered to pay the same, or his surety or sureties, in like manner as all distresses are ordered to be taken by virtue of the act.(f) With respect to actions against parties for anything done in pursuance of the act, one calendar month's notice must be given to the person against whom it is intended to bring the action. It may be left at his last or usual place of abode, and it must set forth the cause of action, contain the name and place of abode of the plaintiff or plaintiffs, and also of his or their attorney. The action must be brought within three calendar months next after the cause of action, and

(a) 58 G. 3, c. 43, s. 8. And inhabitants are declared to be competent witnesses, 33 G. 2, c. 27, s. 16.

(b) 58 G. 3, c. 43, s. 9.

(c) If there be a conviction at Westminster, the latter moiety of the penalty is to be differently disposed of, according to the provisions of an act which was passed to regulate a fish market. So 33 G. 2, c. 27, s. 15.

(d) 58 G. 3, c. 43, s. 6.

(e) 58 G. 3, c. 43, s. 10.

(f) *Id.* s. 12.



laid in the county, &c., where the fact shall have been committed. The defendant may plead the general issue, and give the act and special matter in evidence, and may, before action brought, tender amends to the party or his attorney; and if the same be not accepted, may plead the tender in bar to the action, together with the plea, of not guilty, and any other plea, with the leave of the Court. Further, if it shall appear at the trial that the action has been brought before the expiration of one calendar month after the notice or at the end of three months after the cause of action, or in any other county, &c., than as aforesaid, or after a sufficient tender of amends, the jury shall then find a verdict for, and acquit the defendant. If the plaintiff discontinue after the defendant has appeared, or be nonsuited, or if judgment be given against him upon demurrer, the defendant shall have double costs, with the usual remedies for recovering the same. Lastly, no action, suit, information, or other \*proceeding, shall be brought or commenced against any person, for any offence against the act, unless commenced within six calendar months next after the commission of the offence.(g)

It is declared by the next section, that no provision of any former act for the regulation of any fishery, shall be altered or extended by the present.(h) The fifteenth section is on the right of lords and ladies of manors; but they are required to appoint conservators for the protection of rivers within their respective manors.

The sixteenth section saves the rights of corporate bodies; the seventeenth those of the city of London.

It may be remarked, that as the provisions of former acts are left untouched by the express words of the 14th section, the statute of 1 Geo. 1, s. 2, c. 18, after prescribing the penalty and the mode of levying it by distress and sale, goes on to enact, that the party making default shall be sent to gaol and kept to hard labour, and *suffer such other corporal punishment as the justices shall think fit*. The latter punishment is not mentioned in the new act, but it nevertheless remains unrepealed.

General conservators, or overseers, for the preservation of the salmon, and fish of that species, and the spawn, brood, and fry thereof, and for preventing the destruction of the dams, and also for enforcing the provisions of the act in question, are to be appointed by the justices at sessions, from time to time.(i) Other conservators are appointed by local acts, as the Lord Mayor of London(k) for the River Thames and Medway, certain residents in Hants and Wilts, for the preservation of the salmon fisheries within those counties, &c. ;(l) but the statutes above referred to

[ (g) 58 G. 3, c. 43, s. 13.

(h) Id. s. 14. See also 33 G. 2, c. 27, s. 13, to the end of the statute.

(i) Id. s. 1. Conservancy on rivers was of two kinds—conservancy with respect to nuisances, and to fishing. See Hale de Jure Maris, pp. 23—25.

(k) 17 B. 2, c. 9. 9 Ann. c. 26. 30 G. 2, c. 21.

(l) 4 Ann. c. 15. Stower Fishery, in Essex and Suffolk. 4 Ann. c. 21. Con-

respect these public rights at large; and we have thus ascertained that certain young fish may not be legally taken in public rivers; which is an exception to the general rule above laid down, that all fish except royal fish may become the property of the first taker.

There are several local statutes which impose restrictions similar to the above on the taking of small and young fish, but \*as we do [ \*90 ] not purpose, in a general work of this nature, to enter into the particulars which concern *all* such rivers as have been made the subject of separate enactments, the reader will be referred in the note to some of the principal acts upon this subject, *(m)* and we shall content ourselves with giving a brief notice of the regulations which affect the Thames and Severn.

Indeed with respect to the Thames, it was observed by Lord Coke, (when speaking of the statute of Westminster the second, c. 47, concerning the preservation of salmon in particular rivers therein named), that inasmuch as the Thames was not named there, it should not be included in general words following afterwards in the same statute, and therefore the Thames is added by another act in "the first place."*(n)* Thus no fisher, garthman, nor any other, shall from henceforth put in the waters of Thames, &c., nor any other waters of the realm, any nets, &c., by which the fry or the breed of the salmons, lampreys, or any other fish, may in any wise be taken or destroyed, upon pain of the same punishments as are awarded by the statute of Westminster.*(o)* A subsequent statute recognises this, and confers the conservancy of the Thames and Medway upon the Mayor, or Warden of London. The limit of the jurisdiction is stated to be, from the Bridge of Staines to London, and from thence over in the same water, and in the said water of Medway, as far as it is granted to the said citizens.*(p)* Then, in an act for the better

servators for the Rivers Thames, Humber, Ouse, and Trent, and those in Lancashire, 17 R. 2, c. 9.

*(m)* 4 Ann. c. 21. An act for the increase and better preservation of salmon and other fish, in the rivers within the counties of Southampton and Wilts., and 37 G. 3, c. 95. 2 G. 2, c. 19. Oyster Fishery in the Medway, 23 G. 2, c. 26, ss. 7 and 8. River Ribble, 16 G. 3, c. 36. Pilchard Fishery within the Bay of Saint Ives, in Cornwall, 43 G. 3, c. lxi. As to the Rivers Seyne, Dort, and Plma, in Devon, 43 G. 3, c. lxi. As to the Carmarthen Rivers, 45 G. 3, c. xxxiii.

The acts for encouraging the fisheries in the River Tweed have been already referred to, ante, p. 64. 44 G. 3, c. 45, as to the fisheries in the arm of the sea below Cumberland and Dumfries, and Wigtonshire, and the Stewatry of Kirkcudbright. 45 G. 3, c. 45, as to the salmon in rivers in Carmarthenshire. 46 G. 3, c. 19. Pembrokeshire fisheries in the harbour of Milford.

As to the taking of salmons, see 22 Ed. 4, c. 2. 11 H. 7, c. 23.

*(n)* 2 Inst. 478.

*(o)* 13 R. 2, c. 19. The punishments were, the burning of the nets and engines, for the first offence; imprisonment for a quarter of the year, for the second, and for a whole year, for the third; and according to the words of the act, as their trespass increaseth, so shall their punishment.

*(p)* 17 R. 2, c. 9. The conservancy of the River Thames above Stains Bridge seems to be in the Crown. It was so admitted by the plaintiff in his replication, in a great case concerning the power of the water bailiff. 4 Burr. 1768, Bulbrook v. Goodere. Chitty's Fisheries, p. 262.

preservation and improvement of the fishery within the Thames, &c., it was ordained, that no one should wilfully kill, or expose to sale any spawn, fry, or brood of fish or spat of oysters, or any unsizeable, small, or unwholesome fish, or catch, kill, or \*destroy any fish out of season, [ \*91 ] or expose such fish to sale, or wilfully or knowingly buy, harbour, receive, or use as food for hogs, or otherwise, any such spawn, &c. And for the preservation of the fry, &c., the Lord Mayor is authorized, upon application to him by the Court of Assistants, to order stakes to be driven into the river between the London markstone, above Staines Bridge and London Bridge, so as, nevertheless, that the navigation of the river be not hindered; and no person is to presume to meddle with such stakes without lawful authority.(g) The same prohibition is continued by a subsequent act,(r) and power is also given to the water bailiff to enter into the boats of fishermen, and to seize prohibited fish. Such unlawful fish are to be brought before a magistrate, and being found to be so, either on view, or upon oath, are to be forthwith burnt.(s) With regard to the penalties for disobeying these statutes, it is provided, that the Court of the Mayor and Aldermen may make certain rules for (amongst other things) the preservation of the spawn and fry of fish, and may annex reasonable forfeitures for breaches of the same, so as the penalty do not exceed the sum of five pounds for any one offence.(t) And then it is declared by the second section, that for every offence of destroying spawn &c., such a sum of money shall be paid as is directed by the rules and ordinances above mentioned.

These acts are still in force. If the defendant would justify in trespass, his plea must shew that he took the oyster spat under circumstances which made the taking legal under the aforesaid Acts. The declaration was trespass q. c. f. The plea was, that the l. i. q. was part of a navigable river, and that the defendant was fishing for oyster spat: it was replied that oyster spat was the spawn or young brood of oysters, and unfit for the food of man: the defendant rejoined that the public had a right to fish for oyster spat in a public river, and his pleading was held bad upon demurrer.(u)

There is also a special act for the preservation of fishing in the River Severn. A penalty is awarded against such as destroy the spawn or fry of fish, and unlawful instruments to be destroyed. Conservators of the river are appointed, and there are surveyors of the jurisdictions of the lords of leets and franchises, and of the King's rights.(v)

\*The statutes to which the attention of the reader has been above invited, seem more especially to concern fish which are [ \*92 ]

(g) 9 Ann. c. 26, s. 2.

(r) 30 G. 2, c. 21, s. 2.

(s) Id. s. 5.

(t) 30 G. 2, c. 21, s. 1. See the stat. 33 G. 2. c. 27.

(u) 12 Ad. & El. 13, *Mayor of Maldon v. Woolvet*. S. O. 4 Per. & D. 26. Supposing that the defendant had pleaded that he took the oyster spat to bring it to perfection. Quære?

(v) 30 Car. 2, c. 9.

taken in rivers and arms of the sea; the next which we shall notice is "An Act for the Preservation of Sea Fish." It declares, that any one who shall erect or set up any new wear along the sea shore, or in any haven, harbour, or creek, or shall willingly take, destroy or spoil any spawn, fry, or brood of any sea-fish, in any wear or other engine or devise whatsoever, shall forfeit for each offence the sum of 10*l*, one-half to the King, and the other half to him who shall sue for the same.<sup>(w)</sup>

The taking prohibited by this statute has been held to mean a taking for the purpose of destruction. Debt was brought to recover a penalty of 10*l*. for taking three gallons of *oyster fry and spat*, in Colchester Harbour, with a dredge. There was a second count for taking 100 bushels of spawn, and 100 bushels of brood of sea fish, to-wit, oysters with a drag. The defendant was a Colchester fisherman. The brood oysters in question were young spawn, fit to be laid down on beds, to grow till they came to be oysters. It appeared, that the small fish would thrive if laid down on proper ground, and that the defendant took the brood, which he had removed, to Colchester, to be laid down there on private lands for further growth and maturity, and to make them marketable. It was objected, 1st, that the taking must be with intent to destroy; and, 2ndly, that the act applied to floating fish only. A verdict was taken for the plaintiff on the second count, with leave for the defendant to move to enter a nonsuit. The Court were of opinion, that the rule should be made absolute for entering a nonsuit, on the ground that the acts of Parliament intended to punish those only who took the young fish for the purpose of destruction. For the object was to preserve, with a view to the more beneficial nourishment and growth of that species of fish. Lord Ellenborough was strongly of opinion, and the rest of the Court inclined the same way, that the statute was confined to floating fish; but it was not necessary to decide that point, because the fisherman had taken these young oysters with the express intention of doing an act quite contrary to the offence prohibited.<sup>(x)</sup>

In 1839, a convention was entered into between her Majesty and the King of the French, defining the limits of the oyster fishing between Jersey and the neighbouring coast of France. This convention was directed to be carried out by orders in Council.<sup>(y)</sup>

[\*93] \*The act of 2 & 3 Vict. c. 96, which was only to endure for a specified period, has been renewed by subsequent statutes.<sup>(z)</sup> Further provisions to effectuate the convention were enacted in the year 1843, and to this latter act no limit appears to have been attached.

Mr. Chitty observes upon the statute, that it is very inaccurately framed, in not giving a jurisdiction to convict of the offence against which

(w) 3 Jac. 1, c. 12, s. 2.

(x) 2 M. & S. 568, Bridger, q. t. v. Richardson. (y) 2 & 3 Vict. c. 96.

(z) 3 & 4 Vict. c. 89. 5 & 6 Vict. c. 83. 6 & 7 Vict. c. 79.

its provisions are directed, and that the action of debt, *qui tam*, is, consequently, the only remedy. (a)

The kind of fish which may be taken having now been mentioned, it remains to say something of the disposal of them, when caught; and here, their marketable size, together with the mode of selling them, demand our consideration.

The policy of the law in respect of fish sold here in our own markets, has been for many centuries to exclude foreigners, as far as might be, from any participation in the profits of sales; and also to establish a free market for fish, to the exclusion of monopolies. The offence of forestalling the market was also regarded with peculiar jealousy by our ancestors, and the laws which forbid the anticipation of a free traffic are still in force against such as violate them.

Before we proceed to speak of the fish markets, and of such fish as may be sold there, we will just dispose of the two points above alluded to: first, as to restrictions upon foreigners; and, secondly, as to the offence of forestalling.

It had been forbidden, as early as the reign of Hen. 6, to buy any fresh fish of foreigners; and there was again another prohibition in the reign of Hen. 8, (except as to sturgeon, porpoise, and seal), against buying of any stranger in Flanders, Zealand, Picardy or France, or upon the sea between shore and shore. When these acts expired, others succeeded, armed with similar restrictions, till at length, by the last celebrated statute for repealing the laws relating to the Customs; and consolidating those provisions within a reasonable compass, the restriction imposed upon the importation of fish in the "Table of Prohibitions and Restrictions inwards," is as follows, and comprises the fish named underneath, that is to say, fish of foreign taking and curing, or in foreign vessels, except turbot and lobsters, stock fish, live eels, anchovies, sturgeon, botargo, and caviare. (b)

\*The forestalling the fish market was considered to be an offence in very old times. It was declared, that no herring [ \*94 ] should be bought or sold in the sea, till the fishers were come up into the haven with their herrings, and that the cable of the ship should be drawn to the land. (c) However, by 5 Eliz. c. 5, s. 4, this provision seems to be somewhat qualified. It is enacted thereby, that no purveyor or other person shall, by virtue of any commission or otherwise, take any herring or sea fish, otherwise than by agreement of the owners or sellers of the same fish, upon pain of forfeiting double the value of the herrings so taken. And any person, being the owner or seller of any such fish, may withstand such demands, or the demand of toll, without the goodwill of such owner or seller as aforesaid. Another enactment appointed certain great officers of the realm to take order for the selling and buying of

(a) Chitty on the Game Laws and Fisheries, 2nd ed. p. 251.

(b) 6 G. 4, c. 107, s. 52.

(c) 31 E. 3, st. 2, c. 1.

stock fish of St. Botulf, and salmon of Berwick, and fish of Bristnuit, so that there might be a better market for the King and his people.(d)

Independently, however, of these statutes, the offence in question is punishable at common law, by fine and imprisonment.(e)

Having mentioned the restrictions which are imposed upon fish, which, but for such prohibitions, would be brought into this country by foreigners, we come to speak of our markets, and of one or two incidental matters. A very general abridgment, however, must suffice for the consideration of this topic, by reason of the numerous provisions which the Legislature has ordained on the subject of sales of fish.

Statutes have recently been passed at different times to regulate the market for this commodity, as, for instance, those relating to the buying and selling of herrings at Yarmouth Fair;(f) but the first remarkable act upon this point, was that for making Billingsgate a free market for the sale of fish.

Thus, by stat. 1, of that statute,(g) any person may buy or sell any sort of fish in that market, without any disturbance or molestation whatsoever. The second section exempts fishermen from paying toll there, except according to a certain rate specified in sections 3, 4, 5, 6, and 7.

[\*95] \*By sect. 8, fish bought in the market might be sold in any other, so that none except fishmongers should be permitted to sell in public or fixed shops or houses, being sound or wholesome fish. By sect. 10, any person taking or demanding any toll or sample or any other imposition, or set price, of any seafish whatsoever of English catching, shall forfeit 10*l.*, one-half to the King, and the other to him who shall sue for the same.

By sect. 11, the practice among fishmongers of buying up all or the greatest part of the fish, and then dividing them amongst each other by lot, by which means they were enabled to fix their own rates, is forbidden. The 15th section saves the ancient duty on cod and ling to his Majesty, for the service of his household, payable by such merchants as trade to Westmoney and Iseland.

However, notwithstanding this statute, it seems that Billingsgate was considered a free market from time immemorial. A poor woman who cried fish was indicted, at the instance of the Fishmonger's Company, for forestalling, by buying fish at Billingsgate. And Holt, C. J., directed an acquittal, because there was time out of mind a market at that place;

(d) Id. c. 3. See also Id. st. 3, c. 1, that doggers and lode ships, of Blackney Haven, shall discharge their fish there.

(e) See 1 Ro. Rep. 11, *Rex v. Davies*. Sir Wm. Jones, 310, *B. v. Pen*.

(f) 31 E. 3, st. 2, c. 2. 35 E. 3. An ordinance of Herring.

(g) 10 & 11 W. 3, c. 24.

and were it otherwise, all the fishmongers would be liable to prosecutions.(A)

The next statute of importance was 9 Anne, c. 26; and by the third section of that act it was declared, that, for the more speedy punishment of offenders who were in the daily habit of exposing great quantities of unsizeable and unseasonable fish, no fish should be sold more than once within the market of Billingsgate, or within one hundred and fifty yards of Billingsgate Dock; and that no person other than free fishmongers, in their houses and shops, situate and being in the said distance of one hundred and fifty yards, and not in the market, and other than fishermen, or the first importers of, or persons bringing up fish to that market, their wives, apprentices, factors, or servants, for the time being, actually hired for that purpose, should presume to sell, or expose to sale, any fish there, or within one hundred and fifty yards of the dock, on pain of forfeiting a sum not exceeding 10*l.*, nor less than 5*s.*, to be levied by distress, &c.(i)

And it was ordained by sect 5, that, for the further preventing of forestalling, regrating, and exposing fish at unseasonable hours in the market, no fish whatever should be exposed to sale on board or on shore (within the limits of the market, or within \*the said one hundred and fifty yards,) before three o'clock in the morning, from Lady [\*96] Day to Michaelmas, and before five in the morning from Michaelmas to Lady Day, and so annually; and that the proper officer should ring the bell appointed for that purpose, at the time and place aforesaid, under the penalty above mentioned. After this followed the act for making a free market for the sale of fish in Westminster, for explaining, amending, and rendering the first act more effectual, and for further altering and repealing part of the same. These provisions, however, were neglected from time to time, and seldom, if ever, put in force, so that we shall do no more than merely refer the reader to them in the note. They would, besides, be found very voluminous, even if it were more desirable to insert them at length.(k)

In fact, the market became of so very little use, that an act passed in the subsequent reign, for vesting the estate and property of the trustees of Westminster Fish Market in the Marine Society, for the purposes therein mentioned, and for discontinuing the powers of the said trustees.(l)

In much later times, a doubt arose whether the words of this statute, 33 Geo. 2, c. 27, did not forbid the bringing of fish to any market of London or Westminster which was not in use as a public market at the

(A) The King against ———, 1 Show. 392.

(i) See s. 6, which imposes the forfeiture.

(k) 22 G. 2, c. 49. 29 G. 2, c. 39. 33 G. 2, c. 27.

(l) 30 G. 3, c. 54. The author was informed, some years since, that it had been attempted to enforce some of these nearly obsolete penalties against fishermen, for not entering their arrival at the Nore, but without success.

time of the passing of the act; upon which it was ordained by 4 Wm. 4; c. 19, that nothing in the said act of Geo. 2 should prevent any kind of fish from being brought for sale to any market of London or Westminster, and that no punishment or penalty should attach to them for so doing.

In stat. 22 Geo. 2, c. 49, s. 21, there is a general provision which deserves attention. It is provided by that section, that whereas an act of Geo. 1,<sup>(m)</sup> had prescribed certain lengths or sizes under which certain fish therein mentioned should not be taken; and whereas several of the said fish had been taken with a hook, and though thrown into the sea could not be preserved alive, fish under such dimensions as are prohibited by the recited clause, may be exposed to sale, or exchanged for goods, provided such fish are taken with a hook, and so not fit or capable of being preserved alive.

It having been enacted by 29 Geo. 2, c. 39, s. 1, that a \*pen-  
[ \*97 ] alty should be imposed on fishing vessels employed for the supply of the London and Westminster markets, which should break bulk, or sell their fish before their arrival in the river, or should not enter their arrivals or not sell their fish within eight days afterwards;<sup>(n)</sup> and this provision having been found inconvenient as it respected the sale of eels, it was altered as far as the sale of that kind of fish was concerned. Thus, by 42 Geo. 3, c. 19, in case any such fishing vessel shall be freighted or loaded, in the whole or in part, with live eels, and the fishermen, or other persons, natives or foreigners, being owners of such live eels, or having the power to sell and dispose of the same, shall sell off the whole quantity of such live eels within twenty-eight days after the arrival of such vessel at the Nore, and shall in all other respects comply with the directions of the above mentioned acts; then the sale of the cargo shall be as good a sale as if made within eight days, according to the old provisions of 29 Geo. 2, c. 39.

We come now to the general act for the better supplying the cities of London and Westminster with fish, for reducing the exorbitant price of this article, and for the protection and encouragement of fishermen. By 2 Geo. 3, c. 15, s. 1, any person, although not a fisherman by trade, may buy (subject to the restrictions afterwards mentioned,) at any market, sea coast, creek, port, haven, bank of any river, or place in Great Britain, any fish in season, not unsizeable, or under the legal dimensions, paying the usual and accustomed dues; and he may, moreover, sell the same again in any fish or flesh market, paying the usual stallage, Covent Garden market excepted.<sup>(o)</sup> Provided that such fish be not resold by the first purchaser before it arrives at London or Westminster, under a penalty of 20*l*.<sup>(p)</sup> The fish, moreover, may be sent to the place of consignment, without being stopped in any city, market town, or place, in order to be sold or exposed for sale there, under any pretence of any

(<sup>m</sup>) 1 G. 1, st. 2, c. 18, s. 7.

(<sup>o</sup>) Sect. 2.

(<sup>p</sup>) Sect. 3.

(<sup>n</sup>) See note (b) p. 96.



custom or usage whatsoever.<sup>(q)</sup> The 5th, 6th, and 7th sections relate to fish carriages, and by sect. 8, no toll shall at any time be paid for any such fish carriage returning without fish, or for any horse drawing the same back empty; for passing on any turnpike road, &c., or for any horse returning from drawing any such fish carriage when laden, although such horse be rode by the driver of the carriage, and although such horse do not draw back any such empty fish carriage.

By s. 9. If any game, or other thing than fish, or the implements of the carriage, be put therein, to be conveyed thereby, \*the person [ \*98 ] so putting the game, &c., in, shall forfeit 5*l.*; and if the driver take up, or suffer any passenger, game, &c., to be carried therein, he shall forfeit 40*s.*; and if he do not pay, he shall be sent to gaol for one month, and kept to hard labour. Next, if any fish carriage shall have broken bulk, being consigned to the London or Westminster Markets, before the same shall have been brought into the weekly bills of mortality; or, if any fish shall have been sold before it shall have been exposed to sale at those markets, the owner, or other person having the care of it, shall forfeit 10*l.* for every offence.<sup>(r)</sup> Then the fish being brought up, is to be sorted with all convenient speed, and offered for sale in some public market, (unless it be Sunday, and in that case, on the Monday morning following,) and, until such exposure for sale, no part of such fish shall be sold by retail, on the pain of a forfeiture of 10*l.* for each offence.<sup>(s)</sup> Provided, that nothing in the act shall be construed to prohibit the selling of mackarel, which shall be brought by any such fish carriage as aforesaid, before or after divine service on a Sunday.<sup>(t)</sup>

The two next sections speak of contracts for fish. By s. 13, all such contracts, except for salmon and lobsters are vacated, and the parties discharged from any penalties incurred by a breach of them; and persons contracting in future for fish, other than for salmon and lobsters,<sup>(u)</sup> before such fish may be brought to market, and exposed for sale in the ordinary manner, are made liable to a penalty of 50*l.*<sup>(v)</sup> And no contract even for salmon and lobsters, shall continue in force for a longer period than one year, to be computed from the date of the contract, or if such contract be by parol, from the time of entering into such contract or agreement.<sup>(w)</sup>

The next section provides against the same mischief of dividing the fish among the vendors by lot, which the statute of William so strongly prohibited. No person shall employ, or be employed, in buying in any market at London or Westminster, or elsewhere, within the bills of mor-

(q) Sect. 4. (r) Sect. 10. (s) Sect. 11.

(t) Sect. 12. The reader will be careful to observe from session to session whether the Sunday Trading Prevention bill may have passed. Some alteration may, possibly, be made in these matters, should that bill become law.

(u) But by a subsequent section, this exemption is extended to salt or dried fish, oysters, carp, and tench. Sect. 36.

(v) Sect. 13.

(w) Sect. 14. As to the mode of proceeding, sec. s. 37, *post*, in this Chapter.

talities, any fish brought there to be sold, so as that the same should be divided in lots or shares amongst any fishmongers or others, in order to be subsequently resold, or sold by retail; nor shall any fishmonger buy [ \*99 ] in those markets any fish except for his own sale or use. The \*forfeiture for each of the above offences, is 20*l*.(x) And if any proprietor of fish, or salesman, or person intrusted or employed to sell fish in any public market, shall refuse to sell, or shall enter into any confederacy or agreement not to sell any fish brought there or exposed to sale, he shall forfeit 20*l*.(y)

And further, all fish of the respective sorts hereafter specified, shall be publicly exposed for sale at the first hand, and shall not be sold in any greater number or quantity in any one lot or parcel, or by any greater weight in any one lot or parcel, in Billingsgate Market, or within one hundred and fifty yards of Billingsgate Dock, or in any other market within the bills of mortality, than is hereafter directed. Each lot or parcel is to consist only of one sort of fish.

Fresh salmon, sturgeon, large fresh cod, skait, pike, turbot, bret, brill, pearl, Kingston, ling, and dory, by the single fish.

Half fresh cod, not more than two in each lot.

Quarter fresh cod, not more than four.

Mullet, cod fish, salmon trout, and other trout, not more than two.

All small cod, not more than twenty-four.

Such fish are to be sold in such quantities in Billingsgate Market, or within one hundred and fifty yards of the Dock. In any other market, not exceeding eight in one lot.

| Not exceeding in one lot.  | In Billingsgate Market, or within 150 yards, &c. | In any other Market, &c. |
|--|--|--------------------------|
| All small pike . . . . .   | 6 . . .  | 4                        |
| Large haddock . . . . .  | 4 . . .  | 2                        |
| Small haddock . . . . .  | 24 . . .   | 8                        |
| Perch above six inches long from the eye to the fork of the tail . . | 12 . . .   | 8                        |
| Carp, gurnet, tench, and sea-bass .                                  | 6 . . .  | 4                        |
| Thornbacks . . . . .   | 2 . . .  | 1                        |
| Large soles . . . . .  | 4 pair .   | 2 pair                   |
| Small soles . . . . .  | 8 pair .   | 4 pair                   |

(x) Sect. 15.

(y) Sect. 16.

| Not exceeding in one lot.   | In Billingsgate Market, or within 150 yards, &c. | In any other Market, &c.                                       |
|---|--|--|
| Mackarel, whittings, whiting pouts, plaice, dabbs, herrings, pilchards, garb fish, flounders, maids . . | 60 . .   | 80   |
| Smelts . . . . .  | 52 . .   | 26   |
| Eels . . . . .  | 20lb. weight                                     | 10lb. weight unless any single fish should exceed that weight. |
| Large lobsters and crabs [of either sort] . . . . .   | 20 . .   | 10   |
| Small lobsters and crabs [of either sort] . . . . .   | 40 . .   | 20   |

\*Then, if any person shall sell or buy any such fish at the first hand, in defiance of the rules above laid down as to quantity, or shall sell, or offer for sale, more than one sort of such fish, he shall forfeit 5*l*.(z) However, a smaller number of fish, or a lesser weight of eels than makes one lot, may be sold or exposed for sale.(z)

By s. 19, no fish was permitted to be sold again, or exposed for sale on the same day in the London markets; but the buyer might sell it, if sound and wholesome, in any other place; but this section is repealed.(b) The next section relates to the putting up an account of the sorts and quantity of the fish to be sold, in large legible characters at the fish stand. Any other fish of the sorts above-mentioned, which shall come to market in the course of the day, must be included in such account, and the accounts are to be kept up undefaced until all the fish be sold, or the market be over, upon pain of forfeiture of 5*l*. And if any person shall wilfully take down, deface, or alter these accounts, or cause, &c., he shall forfeit 40*s*.(c) Moreover, no fisherman, mariner, or other person employed on board of any fishing ship, &c., shall, after her arrival from fishing, wilfully destroy, or throw away fish brought from sea in any such vessel, or caught in any navigable river, and so brought, unless it be unwholesome, perished, or unmarketable, except sprats, remaining unsold at the close of the market to which they have been sent. The offender against this regulation is to be committed, \*and kept to hard labour for any time not exceeding two months, nor less than one week, at the discretion of the justice.(d)

(z) Sect. 17.

(a) Sect. 18.

(b) By 36 G. 3, c. 118, s. 1, this section is repealed, and by s. 2, fish may be sold by *retail* in Billingsgate Market, and within one hundred and fifty yards of Billingsgate Dock, once, but not oftener. Sect. 3 invests the lord mayor, aldermen, and common council with the same jurisdiction over the retail market at Billingsgate, as over the other public markets of the city. Sect. 4 makes the act a public act. See also 42 G. 3, c. 19.

(c) Sect. 20.

(d) Sect. 21.

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The twenty-sixth section prescribes the jurisdiction and the mode of recovering penalties. All justices of the peace shall determine the offences within their respective jurisdictions. The forfeiture is to be paid within twenty-four hours after conviction, unless otherwise limited; such conviction to take place, either upon confession, or oath of a witness. The penalty may be levied under a warrant of distress and sale after five days, rendering the overplus; and for want of sufficient distress, the offender, except the driver of a fish carriage, whose punishments are prescribed by previous sections, shall be sent to prison on the application of the proprietor, and be kept to hard labour for any time not exceeding two months, unless the money be sooner paid. The prosecution, however, must be instituted within three months next after the offence; and those who have suffered imprisonment in default of payment, shall not be liable subsequently to pay the penalty.<sup>(e)</sup>

The twenty-eighth section declares, that if any person having contracted for fish, contrary to the intent of the act, shall, before information made against him for the same, inform against any other party concerned in such contract, which party shall be subsequently convicted upon such information, he shall be released from the penalty incurred, and shall moreover have one moiety of the penalty forfeited by reason of the conviction of the person he has informed against. Further, with regard to witnesses, they may be summoned, and examined on oath on behalf of the prosecutor, and if they refuse to appear, or appearing, refuse to be examined, they may be committed for any time not exceeding fourteen, nor less than three days, unless they shew just cause for such their refusal. To compel their appearance, the justice is empowered to issue his warrant.<sup>(f)</sup> Should any person, against whom a warrant may have been issued for any offence against the act, be out of the jurisdiction of the justice who has granted the warrant, any justice for the county, &c., where that person may be, may indorse the warrant, (proof having been first made on oath of its having been signed,) and he may either hear and determine the matter upon the apprehension of the offender, as if it had originally arose within his jurisdiction; or he may return such offender to his original county, there to be dealt with according to law.<sup>(g)</sup> One moiety of all penalties, not otherwise appropriated by the act, is to be paid to the person who shall prosecute an offender to conviction, \*and [\*102] the other moiety to the treasurer of Greenwich Hospital.<sup>(h)</sup>

An appeal to the next quarter sessions is allowed by the thirty-second section, eight days' notice being given previously, together with security to prosecute the appeal with effect. If there be not time to give the required notice, the appeal may be made to the subsequent sessions, when the justices shall come to a determination, and award costs at their discretion. Such costs, as well as any forfeitures which may be adjudged,

(e) Sect. 27.

(f) Sect. 29.

(g) Sect. 30.

(h) Sect. 31.

shall be levied by distress and sale, either of goods of the party, or of those of his security, in case no sufficient distress be found in the first instance.(i)

No order or proceedings of justices shall be quashed or vacated for want of form only, and the order made by the sessions shall be final, and no proceedings of any justice out of or in sessions, shall be removed by certiorari, letters of advocation, or suspension, or otherwise.(k) Six calendar months are prescribed as the time within which an action must be brought for any thing done in pursuance of the act, the general issue may be pleaded, and the special matter given in evidence, and treble costs shall be awarded against the plaintiff if he fail in his suit.(l)

All the provisions and regulations with respect to the place within the weekly bills of mortality, touching the sale or buying of fish, and all penalties for the non-observance thereof, shall extend to the parish of Saint Mary-le-bone, and be in force there.(m)

By section 37, it is declared, that no justice shall receive any information against any person for any offence committed in making contracts for the buying up of fish contrary to the act. Such money payable by way of forfeiture for such conduct, shall be recoverable only, with double costs of suit, by the informer, in some Court of Record at Westminster, where no essoin, &c. One moiety shall be paid to such informer, and the other to the treasurer of Greenwich Hospital.

There are two statutes relative to the granting bounties for taking and bringing fish to London and Westminster, &c. The preamble of the first of these states the expediency of promoting a supply of fresh fish; and the act declares, that the Lords of the Treasury, or any three of them, may give and grant, out of \*the surplus of the moneys granted in the last session of Parliament, for the purchase of stores of herrings, [\*103] such premiums, sums of money, bounties to persons taking and bringing fish to the markets of London, Westminster, or any other city, town, or port in the United Kingdom, and may make and publish rules and regulations in relation to the taking and bringing to market such fish, and may regulate the amount of such bounties, and the terms and conditions, upon which the same shall be granted; and may cause the same to be paid in such sums, and at such times, and in such manner and proportions, and annex such penalties and forfeitures for the breach of any such rules, &c., as shall seem to them best suited to the promoting the beneficial purposes of this act; and also to make any allowances, and apply any such sum or sums of money as they shall think necessary in the payment of any expenses incurred in the promoting and encouraging an increase in the supply of fish.(n) But no bounty to a single vessel was to exceed 500*l.*; nor shall the whole amount go beyond 30,000*l.*(o)

(i) Sect. 32.

(k) Sect. 33.

(l) Sect. 34.

(m) Sect. 35.

(n) 41 G. 3, c. 99, s. 1.

(o) Sect. 2.

An account of the amount of such bounties, of the quantities of fish in respect of which they might have been given, and of the ports or places to which the same should have been brought, was to be laid before Parliament within fourteen days after the commencement of the next session.(t)

Then followed an act for the amendment of this last mentioned statute. Its preamble set forth, that in pursuance of that act, 6000*l.* had been paid into the Irish Exchequer, for the purposes thereof; but that the greater part had not been applied, and that it would be expedient to lay it out for the encouragement of the fisheries and navigation on the Coast of Ireland. And it was ordained that the Lord Lieutenant, &c., might grant that sum or any part of it, for the purposes of assisting any person in enlarging, improving, or rendering more secure any harbour on the coast there, fit for the reception of fishing or other vessels arriving there for the purpose of purchasing fish caught or cured upon the said coasts, according to the Lord Lieutenant's discretion.(u)

And further, that whenever the Lord Lieutenant, &c., should, on application made, be of opinion that any harbour could be so improved, a plan and survey of the harbour should be laid before the Lord Lieutenant, &c., or the chief secretary, together with an estimate, verified upon oath [\*104] by the party making the same. \*Then if the Lord Lieutenant, &c., should approve of the estimate, and as soon also as a sum equal to one-half of the estimate should be paid or secured to the satisfaction of the Lord Lieutenant, or the chief secretary, and also satisfactory security given that the party in question would bear any expenses exceeding the estimate necessary to be incurred in order to complete the improvements, the Lord Lieutenant, &c. might order a sum equal to the moiety of the estimate, to be paid out of the Irish Exchequer, to be applied towards the improvements proposed, but in such sums, and at such times, and in such manner and proportions, and under such rules, &c., and subject to such forfeitures for any breach of rules, &c., as the Lord Lieutenant, &c. might see fit towards promoting the beneficial purposes of the act. The improvement to be forthwith completed agreeably to the plan and survey, or such other plan as the Lord Lieutenant, &c., might approve, provided the execution should not exceed the estimated expense.(v) And, lastly, if the actual expense should exceed the estimate, all such excess was to be defrayed by the person entering into the aforesaid security.(w)

With respect to the third point, namely, the manner by which the fish may be lawfully taken, it seems most proper to refer the reader to the Chapter on User, where the mode of exercising each right connected with the enjoyment of water is discussed at large. The important subject of nets together with the various customs touching the landing of fish, when caught, will be found there.

(t) Sect. 3.

(u) 45 G. 3, c. 64, s. 1.

(v) 45 G. 3, c. 64, s. 2.

(w) Sect. 3. 1 G. 4, c. 103.

We proceed, therefore, to speak of the season for catching fish. And first, with respect to salmon, which have been especially protected by the Legislature during their fence months, it was declared, that inasmuch as salmon had become scarce in consequence of the great destruction which had been made of them in the Thames, no person should take any salmon in that river between the 24th of August and the 11th of November.<sup>(x)</sup> The penalty is now regulated by a subsequent act, and may be imposed at the discretion of the mayor and aldermen, provided there be not a higher forfeiture than 5*l.* for one single offence.<sup>(y)</sup> Then with respect to salmon in the Severn, Dee, Wye, Teame, Were, Tees, Ribble, Mersey, Dun, Air, Ouse, Swaile, Calder, Wharf, Eure, Derwent, and Trent, they might not be taken between the 31st of July and the 12th of November. To use the words of the statute, "no one shall kill, destroy, or wilfully hurt any salmon of any kind or size [\*103†] in any of the said rivers," during that period, on pain of forfeiting 5*l.* with the fish and the nets, &c.<sup>(z)(a)</sup> It seems, says Dr. Burn, that the fish, so illegally taken, are forfeited to the King.<sup>(b)</sup>

But this portion of the act of 1 Geo. 1, c. 18, is repealed (though only *so far*) by the 6 & 7 Vict. c. 33, s. 1. The statute effects the repeal of 1 Geo. 1, c. 18, as far as concerns the days between which salmon of any kind or size are to be taken, killed or destroyed, or wilfully hurt, in the said rivers, (*i. e.*, the rivers, Severn, &c.) and the penalties therein mentioned. The 2nd section extends all the provisions of the stat. 58 Geo. 3, c. 43, to the rivers mentioned in 1 Geo. 1, c. 18, such provisions, of course, excepted, which the 6 & 7 Vict. c. 33, repeals. The 3rd section provides for cases where any of the rivers mentioned in 1 Geo. 1, c. 18, or which the provisions of 58 Geo. 3, c. 43, apply, happen to run between or form the boundary of two adjoining counties. In this case the justices of either county, at their quarter sessions, upon the neglect of the justices of the adjoining county to fix the fence days, may themselves fix such days for the protection of salmon trout, &c. or any brood, &c., of the same, in any portion of a river forming the boundary. The 4th section prescribes a kind of umpirage. For if the justices of the two counties cannot agree, the justices of the county next adjoining, through which the lower course of the river shall entirely pass, shall fix the days, upon notice from the clerk of the peace of either of such adjoining counties. If there be no such county, then the justices of the county, through which the upper course passes, shall be called upon. Provided that the first of such fence days be some day between the days proposed by such adjoining counties for the commencement of such fence days, and the last of such days shall be a day between the days proposed by the said adjoining counties for the determination of such fence days. The 5th section gives jurisdiction over offences, in

(x) 9 Ann, c. 26, s. 2.

(y) 30 G. 2, c. 21, s. 1.

(z) See ante, for the punishment for non-payment.

(a) 1 G. 1, st. 2, c. 18, s. 14.

(b) Vol. 2, p. 395, ed. of 1820.

the cases of boundary, to any justice or justices acting for one or either of such counties. The 6th section repeals the stat. 58 Geo. 3, c. 43, s. 4, with reference to taking and selling spawn, &c. And by sect. 7, no person shall, upon any pretence whatsoever, at any time after the days fixed as aforesaid for the fence days, take, kill, or destroy, or have in possession, either on the water or on the shore, or shall bring to shore, or cry, or carry about, sell, offer, or expose to or for sale, or shall exchange [\*104†] for any goods, &c., any spawn, or fry, or \*brood of fish, or unsizeable fish, or any kepper or shedder salmon, being unseasonable salmon, caught during prohibited periods. Any conservator, or other person appointed under 58 Geo. 3, c. 43, or this act, may seize any such spawn, &c., with all baskets and packages, and may deliver the person, on whom the same may be found, to a constable or peace officer, who shall have possession of the spawn, and baskets and packages. The offender must then, together with the matters seized, be conveyed before a magistrate, and upon conviction, the spawn, and the baskets and packages shall be forfeited, and be delivered by order of the magistrate, to the person who shall have seized and prosecuted to conviction the offender. And the penalty for the offence shall be a sum not exceeding 10*l*., nor less than 5*l*. By sect. 8, all the powers, &c., and penalties, &c., of the 1 Geo. 1, c. 18, and 58 Geo. 3, c. 43, shall be applied to this act. Then by 11 & 12 Vict. c. 52, whereas it is expedient to remove doubts which have arisen, whether the acts of 58 Geo. 3, c. 43, and 6 & 7 Vict. c. 33, extend to tributary streams, and whether the latter statute extends to salmon trout, and fish of the salmon kind. The 1st section expressly affirms the extension of those statutes to tributary streams. The 2nd section affirms also such meaning to embrace salmon trout, and fish of the salmon kind, in like manner as if salmon trout, and fish of the salmon kind, had been mentioned in all cases where salmon is mentioned in those acts. But this act is not to be retrospective. (s)

By 1 Geo. 1, st. 2, c. 18, s. 15, whereas several fishmongers of London and other cities and towns, by themselves, or their agents, frequently buy and contract with the fishermen using the said Rivers of Severn, Dee, Wye, Teame, Were, Tees, Ribble, Mersey, Dun, Air, Ouze, Swaile, Calder, Wharf, Eure, Derwent, and Trent, or others employed by them, for great quantities of salmon to be taken in the said rivers, which gives great encouragement to the taking salmon there of unsizeable lengths, and at unseasonable times; it is enacted, that no such salmon shall be sent to London to such fishmongers, or their agents, that shall weigh less than six pounds each fish; and every person buying selling or sending any such salmon of less weight than six pounds, who shall be convicted thereof in manner as aforesaid, shall forfeit the sum of 5*l*. for every such offence, besides that the fish so to be bought and sold; one moiety of the said sum and fish to be paid and distributed to the informer or informers, and the other moiety thereof to the poor of the parish where such offence shall be committed; the said sum, if not



paid upon conviction to be levied by distress and sale of the offender's goods and chattels, by warrant under the hand and seal of the justice or justices of peace, before whom he shall be convicted, as aforesaid, rendering the overplus, if any be, over and above the charges of such distress, to the owner; and in default, of such sufficient distress, the offender shall be committed by such justice or justices to the house of correction, or other county gaol or prison, there to be kept to hard labour for the space of three months, unless the said forfeiture shall be in the meantime paid. By sect. 16, a punishment under this act shall relieve the offender from the penalty of any other law in respect of the same offence. By sect. 17, an appeal is given to the next general quarter sessions.

But there is an exception, in a subsequent act, of the River Ribble. The respective owners and proprietors of the fisheries and fishings in that river, together with all other persons entitled to fish therein, their lessees servants, &c., may take any salmon peal, or salmon kind therein, between the 1st of January and the 15th of September, and sell the same within the time aforesaid.<sup>(z)</sup> The same penalties are awarded against persons catching salmon out of season in this river, as were prescribed by the act of George I.<sup>(a)</sup>

The statute of Westminster, which first restrained the common law right of taking salmon, speaks generally of all waters within the realm, and mentions particularly the Humber, Ouse, Trent, Done, Aire, Derwent, Wharf, Nid, Yore, Swale, Tees, Tyne, and Eden. Most of these rivers, are, however, mentioned in subsequent acts, as we have just seen; but the season for taking the salmon in such as are not so included, is from the Nativity of our Lady unto St. Martin's Day.<sup>(b)</sup> The penalty for disobedience has been already alluded to in a former page.<sup>(c)</sup> The times prohibited are, therefore, between the 8th of September and the 11th of November.<sup>(d)</sup> And Lord Coke observes, that fishermen, for a little lucre, did much harm by fishing for salmon at unseasonable times.<sup>(e)</sup>

Again the taking of salmon was prohibited from Michaelmas until the Purification, in the Rivers Lon, Wyre, Mersey, Ribble, and all other waters in the county of Lancaster;<sup>(f)</sup> but nearly all these rivers have been mentioned in subsequent statutes, wherein an alteration of the season has been made; and this statute, consequently, will only apply to such waters, in the county of Lancaster, as have not been so subsequently noticed.

There is, moreover, the following general provision concerning the pro-

(z) 23 G. 2, c. 26, s. 7,

(a) Id. s. 8.

(b) 13 Ed. 1, c. 47, recognised and enforced by 13 R. 2, c. 19. 17 R. 2, c. 9.

(c) Ante, p. 85.

(d) 2 Inst. 478.

(e) Ibid.

(f) 13 R. 2, c. 19. The season for taking salmon in the Southampton and Wilts rivers, is the same with that mentioned in 13 Ed. 1, c. 47, supra, 4 Ann. 3. 21, s. 1.

tection of salmon. By 55 Geo. 3, c. 48, s. 2, where no provision is made by any act now in force, for limiting the times for taking salmon in any river in England, the justices, at their quarter sessions, are required to fix certain, not exceeding one hundred and fifty, days in each year, for each river within their respective counties, to be fence days in the several rivers; and, during that time, no such fish shall be taken, nor any brood or spawn thereof. And the justices are empowered, at sessions, to vary annually the number of such days, and the period of their commencement. This step must, however, be taken at the request of some person, who shall give notice of his intention to apply, in some newspaper, usually circulated within the county.

Young salmon shall not be taken nor destroyed by nets, nor by other engines, at mill pools, from the midst of April unto the Nativity of St. John the Baptist.<sup>(g)</sup> These young salmon mean salmon pears, or salmon smelts; they are so called salmon sews, or salmon issues.<sup>(h)</sup>

For the preservation of pilchards, it is ordained that no person shall, in any year, from the 1st of June until the last day of November, presume to take fish in the high sea, or in any bay, port, creek, or coast; of or belonging to Cornwall or Devon, with any drift-net, trammel, or stream-net, or other such net, unless, it be at the distance of one league and a half, at least, from the respective shores, upon the penalty of forfeiture of the said nets so employed, or the full value thereof, and one month's imprisonment, without bail or mainprize.<sup>(i)</sup>

And no action will lie for an infringement of a right to take pilchards, if a statute creates a penalty for such infringement. As in the case of the pilchard fishery of St. Ives. The passing from one stem into another was prohibited under a penalty and the mode of recovering it was specifically provided. The plaintiff \*having a right under a local and [\*107] personal act which prescribed the penalties above mentioned, was about to inclose fish in his net, but was obstructed by the defendant, who captured the fish in another net. Here it was held upon motion in arrest of judgment that the action would not lie.<sup>(k)</sup>

A statute for the preservation of lobsters declares, that, whereas the principal time for the spawning of lobsters is from the beginning of June to the first of September, in which three months the lobsters crawl close to the shore, to leave their spawn in the clinks of the rocks, and as much under the influence of the sun as possible—no fisherman or other person shall with trunks, hoop-nets, or in any other way, take, &c., any lobsters on the sea coast of Scotland, from the first of June to the 1st of September, under a penalty of 5*l.* for each offence, to be recovered by any one suing the same, upon a summary complaint before two justices of the

(g) 13 Ed. 1, c. 47. 13 R. 2, c. 19. 17 R. 2, c. 9.

(h) 2 Inst. 478.

(i) 13 & 14 Car. 2, c. 28, s. 1.

(k) 17 Law J., Q. B. 163, *Stevens v. Jeacocke*; S. C. 11 Q. B. 731.

shire on the coast where the offence shall happen to have been committed.(f)

There are yet some regulations respecting particular fisheries, which remain to be noticed.

First, as to the white herring fishery. We have a great number of statutes affecting this branch of our trade, but they are by far too voluminous to be comprised at length in a general treatise of this nature. The reader is, therefore, referred to them in the note.(m)

With regard to the season for taking pilchards, something has been already said. It is further ordained, concerning the trade of these fish, that pilchards and tumathoes in cask, shall be bought of the owners and adventurers in fishing only, or with their express allowance, on pain of forfeiting the fish and casks, or their full value, half to the King, and half to him who will sue for the same.(n) Again, if any owner, partner, &c., shall fraudulently purloin, &c., dispose of by sale, or otherwise, or cause, &c. out of the nets, boats, or cellars, any pilchard-fish without leave of the proper owners, and major part of the company respectively, he shall pay treble the value in satisfaction to the parties so wronged, and be sent to the House of Correction for three months.(o) And, lastly if any idle or suspicious person or persons, shall in the night assemble, and flock together about the nets, boats, or cellars belonging to any pilchard craft upon any of the coasts of Cornwall or Devon, having no business there, and being warned by the company or owner of such boats or cellars to be gone, he shall, upon complaint made to a justice, and refusing so to depart, forfeit 5s. to the use of the poor of the parish, or be set in the stocks for five hours.(p)

There are also several statutes for the regulation and encouragement of the Greenland and southern Whale Fisheries, to which we can do no more than invite attention, by referring to the several provisions in the note.(q)

(f) 9 G. 2, c. 33, s. 4.

(m) 23 G. 2, c. 24. 26 G. 2, c. 9. 28 G. 2, c. 14. 11 G. 3, c. 31, expired. 12 G. 3, c. 58, s. 6, expired. 26 G. 3, c. 81.\* 27 G. 3, c. 10. 35 G. 3, c. 56. 39 G. 3, c. 100. 48 G. 3, c. 110. 51 G. 3, c. 101. 52 G. 3, c. 153. 55 G. 3, c. 94. As to the packing of herrings, see 11 H. 7, c. 23. 15 Car. 2, c. 16. And also 5 El. c. 5, ss. 6 & 7, that no herring not salted, packed, and casked sufficiently, should be brought in a stranger's bottom; with a proviso excepting herrings brought in by shipwreck.

(n) 13 & 14 Car. 2, c. 26, s. 3.

(o) Sect. 4.

(p) Sect. 5. See also 16 G. 3, c. 36. An act for the encouragement and improvement of the pilchard fishery, carried on within the Bay of St. Ives, in Cornwall. 31 G. 3, c. 45. 45 G. 3, c. 102. 48 G. 3, c. 68.

(q) See as to the Greenland fishery, 15 Car. 2, c. 16. 4 & 5 W. & M. c. 19. 1

\* It was held by the Court of Exchequer, that the bounty given by this statute on the buss (a vessel) fishery, for herrings, was not payable where the buss lay in port, and sent out her boats to fish. 3 Anstr. 926, *Edgar v. Millar*, in Error from the Court of Exchequer in Scotland. See, however, 1 & 2 G. 4, c. 79. 11 G. 4, and 1 W. 4, c. 54, repealing the bounties.

Also to protect and regulate the Newfoundland Fisheries, for which see the note.(r)

The like also regarding the Scotch Fisheries.(s)

[\*109] \*And the Irish fisheries.(t)

There is a prohibition against Scotch weirs erected in rivers between high and low water mark, and likewise in rivers where the water is perfectly salt.(u)

Some notice, however, must be taken of the statute 42 Geo. 3, c. 77, the act for permitting British ships to carry on fishing in the Pacific Ocean without a license from the East India or South Sea Companies, because there have been some cases upon the subject. The act declares, that it shall be lawful for any British built ship, owned and navigated according to law, to pass through the Straits of Magellan, or round Cape Horn, and to carry on the fisheries in the Pacific Ocean, from Cape Horn to 180 degrees of west longitude from London, and to trade within the same limits, without having obtained any previous license, &c., from the Court of Directors, &c., or the governor and company of merchants trading to the South Sea. A question arose, whether vessels might trade without fishing, under this act, or whether it was incumbent upon the owners of such ships to combine fishing with their trade. The matter arose in an action upon a policy, where it was contended, that the master of the vessel had not procured a license from the South Sea Company. The jury found for the plaintiff; and upon a motion to enter a non-

Ann. st. 1 c. 16. 11 G. 3, c. 38, virtually repealed by 26 G. 3, c. 41, ss. 14 and 17, expired. 26 G. 3, c. 41. 29 G. 3, c. 53. 32 G. 3, c. 22. 42 G. 3, c. 22. 44 G. 3, c. 35. 46 G. 3, c. 9. 55 G. 3, c. 39. 58 G. 3, c. 15. And as to the Southern Fishery, 26 G. 3, c. 50. 28 G. 3, c. 20.\* 35 G. 3, c. 92. 38 G. 3, c. 57. 42 G. 3, c. 77. 43 G. 3, c. 90. 51 G. 3, c. 34. 53 G. 3, c. 111. 55 G. 3, c. 45. 1 G. 4, c. 33. 3 G. 4, c. 104.

(r) 15 Car. 2, c. 16. 15 G. 3, c. 31. 26 G. 3, c. 26. 28 G. 3, c. 35. 29 G. 3, c. 53. 33 G. 3, c. 76. 59 G. 3, c. 38. 5 G. 4, c. 51. 10 G. 4, c. 77. 13 & 14 Vict. c. 80, repealing 13 Geo. 3, c. 31, s. 16, as to the liabilities of fish and oil in the first instance to the payment of seamen's wages. 2 & 3 W. 4, c. 79; 7 & 8 Vict. c. 95. The Trout Fishery, 8 & 9 Vict. c. 26. Cod fish, ling, and lakes caught in Chaleur Bay, may be imported. 13 G. 3, c. 72.

(s) 13 G. 1, c. 26. 30. 29 G. 2, c. 23. 26 G. 3, c. 81. 106. 48 G. 3, c. 110. 9 G. 4, c. 39. The Oyster Fishery in Scotland, 3 & 4 Vict. c. 74. The herring Fishery in Scotland, 10 & 11 Vict. c. 91. The Mussel Fishery in Scotland, 10 & 11 Vict. c. 92.

(t) 57 G. 3, c. 69. 58 G. 3, c. 94. 59 G. 3, c. 109. 5 & 6 Vict. c. 106. 7 & 8 Vict. c. 108. 8 & 9 Vict. c. 108. 9 & 10 Vict. c. 3. 9 & 10 Vict. c. 114. 11 & 12 Vict. c. 92. And as to the Mackerel Fishery, 35 G. 3, c. 54. 36 G. 3, c. 77. Fishery Piers and Harbours, 10 & 11 Vict. c. 75.

(u) 1 Alc. & N. 442, *Duke of Devonshire v. Smith*. Id. 459, n., *McAdam, q. t. v. Halliday*.

\* The construction put upon the word months, as mentioned in these statutes, is lunar months. A month is considered in uniform legal construction to be a lunar month, unless the context requires a different interpretation. 1 Esp. 246, *Lacon v. Hooper*.

suit, it was argued on behalf of the plaintiff, that it was no more necessary that trading ships should fish, in order to entitle themselves to the benefit of the statute, than that fishing ships should trade in order to bring themselves within the same indulgence. On the other side, it was said that the South Sea Company would be deprived of their monopoly in this covert and ambiguous way. The Judges felt surprised at first at the largeness of the privilege contended for; but on a subsequent day, Mansfield, C. J., delivered judgment, and said, that considering the act to have been made for the benefit of trade, as well as of the fisheries, and considering also that questions might arise on the degree of fishing which might be necessary in order to qualify a ship to trade, the Court were determined to hold that a ship might go, either for the sole purpose of trade, or for the sole purpose of fishing; and the rule for a nonsuit was accordingly discharged.<sup>(v)</sup> The authority of this last case was sustained a few years afterwards. The question was again raised [\*110] under 46 Geo. 3, c. 84, which gives the same privilege to neutral vessels, if licensed, as to British ships under 42 Geo. 3; and it was said, that the opinion of Lord Chief Justice Mansfield was delivered as if his Lordship had not satisfied his mind on the point. But the Court upheld the first authority, observing that the word trading was mentioned in the enacting clause, and that, although the preamble of the statute was the key, and though it mentioned fisheries only, yet that it could not restrain the enacting part. And Gibbs, C. J., said, that according to the verdict of *Jacob v. Jansen*, no doubt was expressed by the Lord Chief Justice when he delivered judgment, however he might have hesitated at first.<sup>(w)</sup>

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It has been observed in the early part of this Chapter, that there are four sorts of private fisheries, that is to say, a several, a free, a common of fishery, and a fishery in gross; but we have also intimated that these may be easily resolved into three, that is to say, a several fishery, a free, and a common of fishery. We have also observed, that writers are not agreed as to the exact application of these terms. It will therefore be advisable in this place that we should examine the different authorities upon the subject; and, although perhaps after all, we may find them irreconcilable, the inconsistencies will be found to lie more in words than in substance, and by inserting proper counts in a declaration, no serious difficulty can arise by reason of the uncertainty.

A right of any kind, means, in strict legal language, a profit or easement, which is enjoyed in the soil of another; and thus, when we speak of a right of fishery, we mean the liberty of fishing in the water of another; and it has been so defined.<sup>(x)</sup> When, therefore, we discover that the soil over which the stream runs, and the water itself, belong to the same person, we do not say correctly, that such an individual has a right of fishery, because the land and its profits are so completely identified as his inheritance,

(v) 3 Taunt. 534, *Jacob v. Jansen*.

(w) 2 Marsh. 440, *Gill v. Denlop*. 7 Taunt. 193, S. C.

(x) 4 Com. Dig. 365.

that they cannot be separated. If any description be applied to it, it should be that of territorial fishing,<sup>(y)</sup> because the party has the dominion over the territory or land itself. And hence it follows, that those [\*111] who maintain \*the opinion that the owner of a several fishery must necessarily have the soil as incident to the enjoyment, will consider this territorial possession as the several fishery so frequently mentioned in our books.

In speaking, first, of a several fishery, it appears clearly, that if the doctrine mentioned in the last sentence were the true one, it would be unnecessary to enter further upon that subject; and this first species of fishery might then be laid out of the question. But as there are many considerable opinions and authorities contrary to this position, and from which it may be collected that the property of the soil may be in one person, and a right of several or exclusive fishery in another, it becomes indispensable to put these contradictory statements to the test of an inquiry.

Our early law writers have not been so sparing of their remarks upon fisheries. Bracton expresses himself thus, speaking of free tenements: A fishery also, may be said to be a free tenement, either several or in common, in a man's own grounds; as if any one possess land on both sides of the water, near the bank, here he may fish without the hindrance of any, as his own free tenement, &c.,<sup>(z)</sup> So it is again, if he possess only the land on one side of the water, then he may fish to the middle line of the stream; unless by chance he have imposed a service on his land, so that another may fish with him; and so in common; or that another may fish *by himself out of the whole*; or again, that any one should have imposed upon himself a service, so that he could not fish.<sup>(a)</sup>

This rule is very universal. So that if the lord of a manor would intrude his claim, he must make it out by evidence of his own. As by a deed. But the presumption that a general fishery passed to the lord as appurtenant to the manor under a deed is rebutted by proof that before the date of the deed owners of land within the manor and on the bank of the river had the right of free fishery therein.<sup>(b)</sup>

We have next the commanding authority of Lord Coke. A man may prescribe to have a several fishery in such a water, and the owner shall not fish there, but if he claim to have common of fishery, or free fishery, the owner of the soil shall fish there. All this, says the learned commentator, has been \*resolved<sup>(c)</sup> So again, if one be seised of a [\*112] river, and he grant a several fishery in the same, and make livery of seisin secundum formam chartæ, the soil does not pass, nor the

(y) Schultes, 87.

(z) Bract. lib. 4, c. 28, s. 1.

(a) Id. Ibid. See also Id. lib. 4, c. 44; c. 45, s. 1; c. 49. Flet. lib. 5, c. 41, s. 3.

(b) 1 Car. & K. 549, Lamb v. Newggin. In this case there was a misjoinder in the declaration, but the Judge would not nonsuit the plaintiff.

(c) Co. Litt. 122, (a).

water, for the grantor may take water there, and if the river become dry, he may take the benefit of the soil, because a particular right only passed to the grantee, and the livery being secundum formam chartæ cannot enlarge the grant. And if a man grant his water, the soil shall not pass, but the piscary within the water shall.(d) Lord Hale's authority follows: "One man may have the river, and others the soil adjacent; or one man may have the river and soil thereof, and another the free or several fishing in that river."(e)

The next step will be to collate the authorities on this side of the question, namely, that a several fishery may be used, independently of the right of soil. And a case may be cited to this effect as early as the reign of Edward 8.(f) So again, it was insisted some years afterwards, in an action of trespass for fishing in a several fishery to which liberum tenementum had been pleaded, that the soil might be in one, and the fishing in another, and that in answer to the defendant's plea, the plaintiff might shew how he had become entitled to the right he claimed. And it was urged in the same case, that a grant of several piscary would not debar the owner of the soil from fishing. But the other side put it strongly, that the soil would pass in such a case with the fishery; and it was subsequently arranged, that the counsel for the plaintiff should plead to the justification, and thus, by prescribing for a several fishery, the ownership of the soil would be regarded as distinct from the right.(g) And, which is very material, it was also said in that case, that no one except the defendant should be intended to be the owner of the several fishery, *unless the contrary were shewn*.(h)

Moreover, a case was determined in 1657, which seems to be decisive upon this side of the argument. Trespass was brought for fishing in certain rivers, the defendant justified and made title to a moiety of the fishery, and said that those whose estate he had granted a free fishery to the plaintiff or to those whose estate he had, but it appearing that the plaintiff had the several fishery, judgment was given for him. And [\*113] by the Court: If one having a several fishery grant a free fish. ing, the grantee shall have free fishing with the grantor, but if he grant his fishing without saying any more, the entire right shall pass.(i)

Having set forth the opinions of the ancient commentators on the law of this several fishery, together with the authorities which seem to bear upon the point, it only remains to be observed, that modern writers of great eminence have entertained similar sentiments. To mention one or two. Mr. Hargrave says, that why a several fishery should not exist

(d) Id. 4, (b).

(e) De Jure Maris, p. 6.

(f) 46 E. 3, 28, pl. 21.

(g) 18 H. 6, 29. See 20 H. 6, 4.

(h) 18 H. 6, 29, and see an opinion of Mr. Baron Wood, in Chitty on Fisheries, p. 295. The opinion was, in effect, that the owner of the soil being prima facie the proprietor of the fishery, liberum tenementum would be a good plea on his part, to force the plaintiff to shew, how he could claim a several or free fishery.

(i) 2 Sid. 8, Alderman de Londres v. Hasting.

without the soil as well as a several pasture(*k*) is not easily to be understood, and he asks where the inconsistency would lie in granting the sole right of fishing with a reservation of the soil and its other profits. The plea of *liberum tenementum* may be replied to by prescribing for a several fishery.<sup>(l)</sup> And Mr. Schultes, in his very elaborate essay on aquatic rights, is decidedly of the same way of thinking. He observes, that property in private rivers may be subjected to every kind of restriction by convention and agreement; a man may grant the soil for the purpose of erecting a weir or mill, and reserve the right to fish and take water. He might yield his own prerogative of fishing on the other hand, and so confer upon his grantor an exclusive or several fishing without the ownership of the soil, or he might grant a license to other persons to fish in common with himself.<sup>(m)</sup>

Therefore, to sum up the matter, it seems clear, that the owner of a territorial fishery, so to speak, may either make a grant, and thereby exclude himself, or he may permit another to enjoy a co-extensive or limited right of fishing in his own water, still reserving his ownership. And, indeed, so far from a several fishery being necessarily incident to the soil, it should seem in strictness it must be separated therefrom, because if the proprietor of the soil admit another to participate in the profit, a free fishery or common of fishery is hereby granted; and if he do any act to exclude himself, he either retains the soil, and a several fishery passes to his grantee, or he parts with both the soil and piscary, and then a territorial fishing is conferred by the alienation. Much confusion would be prevented by calling this latter fishing territorial, as being identified with the property, and giving to that the name of a several fishery [<sup>\*114</sup>] which is enjoyed, as all rights, properly speaking, must be, in *alieno solo*.

It may just be added, before we proceed to investigate the authorities on the other side of the question, that the owner of an exclusive fishery is *prima facie* presumed so be owner of the soil.<sup>(n)</sup> But Mr. Justice Bayley has observed, that such a presumption will only obtain when the terms of the grant are unknown, for that, if the grant appear to convey an incorporeal hereditament only, the presumption is destroyed.<sup>(o)</sup> This doctrine of the learned Judge is of itself sufficient to shew that the impression on his mind must have been in favour of the existence of an exclusive fishery, independent of the soil.

Many authorities are, however, relied on in support of a doctrine entirely opposite to the foregoing. Their purport is, that a several fishery is

(*k*) There may be a prescription to exclude the lord from pasture in his own soil, but not to debar him from entering upon it to take other profits, as the trees, gravel, &c.

(*l*) In his notes upon Co. Litt. 122 (b), n. 7. See Dy. 267 (b).

(*m*) See the Treatise, pp. 85—101.

(*n*) Loft. 364, Anon. S. P. 2 Chit. Rep. 658.

(*o*) 5 B. & C. 886. See Co. Litt. 122 (a), n. 7.



necessarily incident to the ownership of the soil over which the fishery is exercised.

According to this argument, a man could not grant an exclusive right of fishing without passing the soil, although he might still create a free, or common of fishery, by permitting another to fish with him.

In a very early case in the Year Books, the writ of *monstraverunt* was brought for certain land with a common of fishery attached, <sup>(p)</sup> and as this with other real writs has been occasionally resorted to for the purpose of recovering a piscary, it was supposed that a several fishing could not be separate from the soil. It will not escape notice, that both appendant and appurtenant commons are allied to land, a circumstance which considerably strengthened the argument. Then again, trespass was brought by the Abbot of D. for taking a fish in his common fishery, and as the word "common" here most likely meant a fishery enjoyed in common with another, and so might in truth have been a several fishery, this is *prima facie* a good case for uniting the soil with the piscary, because trespass being a real writ would of course include the soil. <sup>(q)</sup>

The next case has been much relied on by the advocates for uniting the fishery and the soil. The plaintiff sued in trespass \*for an injury to his several piscary, and the defendant pleaded *liberum tene-mentum*. [•115] Pigot argued that this was not a good plea, because it might have been that the lessor had granted a several piscary in his own water, and so the freehold would remain in him, although he could not fish. But by Brian C. J.; It seems to me that the plea is good, for there is a great difference between a several and a free fishery, for no man can have a several fishery unless it be in his own soil, but I may grant a free fishery to twenty persons in my own pool. <sup>(r)</sup> And on a subsequent occasion it was again said, that one might have free fishery in the water of another well enough, but not several. <sup>(s)</sup>

Again, trespass was brought for taking fish in a several fishery, and the plaintiff recovered, no objection being made to the form of the action. <sup>(t)</sup> It must be presumed, that the soil belonged to the owner of the fishery. While, on the contrary, judgment was reversed in an action of trespass brought for taking the plaintiff's trouts in a *free* fishery. <sup>(u)</sup> This same doctrine, however, received a further confirmation in a case where trespass was brought for taking fish in a free fishery, but in order to understand the case clearly with reference to that last mentioned, it

<sup>(p)</sup> 40 E. 3, 45.

<sup>(q)</sup> 4 H. 6, 11, pl. 7, and see Bract. lib. 4, c. 45, s. 4, who speaks of the writ *quod permittat*, as brought for a common fishery, and F. N. B. 123, *quod permittat* for a free fishery. See also Schultes, p. 47.

<sup>(r)</sup> 17 E. 4, 6, pl. 5. 18 E. 4, 4, pl. 24. S. C. Sembl. S. P. 10 H. 7, 24. Id. 28, Sembl. S. C.; and see 2 Ro. Rep. 30, by Houghton, J.

<sup>(s)</sup> 7 H. 7, 13. Bro. Tres. pl. 282, cites S. C.

<sup>(t)</sup> Cro. Car. 554, Child v. Greenhill. S. C. Mar. 48. S. C. Sir Wm. Jones, 440. 2 Ro. Ab. 564.

<sup>(u)</sup> 3 Mod. 97, Upton v. Dawkin. S. C. Comb. 11.

should be premised, that Lord C. J. Holt distinguished a free from a common fishery. After verdict for the plaintiff, it was moved to arrest the judgment on the same principal which prevents a commoner from maintaining trespass for injuries done to his common. The Chief Justice, however, would not allow the objection. He said, that there were three sorts of fishery:—1. Several; where the party was owner of the soil, and so *liberum tenementum* was a good plea; 2. Free; where the grantee had a property in the fish, and he might bring his action for them without making any title; and lastly; Common of fishery, which resembled other commons. And further, the Lord Chief Justice denied the authority of Lord Coke, which we have quoted. Mr. Justice Eyre differed entirely from this, holding, that free and common of fishery were the same. Dolben, J. was of the same opinion with Holt.<sup>(v)</sup> It was even held in a subsequent case, by the same very learned Judge, that a free [\*116] fishery implies a right in the \*soil. Trespass was brought for fishing in a several and free fishery. The jury found for the defendant as to the several, and for the plaintiff as the free fishery. The *locus in quo* was part of the manor of D., and the plaintiff was lord of that manor, and the question was, whether one might have a free fishery in his own soil. By Holt C. J. The owner of the soil may perhaps have liberty of fishing; trespass lies not for hindering a commoner of his common; bringing trespass for fishing in *libera piscaria*, seems to imply a right in the soil.<sup>(w)</sup> In his own report of this case, he says that a separate and free fishery are all one;<sup>(x)</sup> that by the grant of fishery the soil passes; that where the owner of the soil has a right to fish with others, he may have an action of trespass; which, however, does not lie for him who has a mere liberty to fish; and that, in the absence of proof to the contrary, such a fishery should be intended the plaintiff's several fishery.<sup>(y)</sup>

Then, lastly, in a case where a pauper had rented the fishing of a pond with the spear, sedge, moss and rushes growing there, for 10*l.* a-year: provided he supplied his lessor's house with fish, the Court held, that a settlement had been gained, because the fishery and the soil should be intended to have passed together.<sup>(z)</sup> And by Buller, J.: "The fact of letting a fishery is sufficient, and we must presume that the soil passed along with it: though I am by no means ready to allow, that if it had been any other kind of fishery, it would not have given a settlement."<sup>(a)</sup> Mr. Justice Ashurst said, "There is no doubt but that a fishery is a tenement. Trespass will lie for an injury to it, and it may be recovered in ejectment."<sup>(b)</sup>

(v) 2 Salk. 637, *Smith v. Kemp*. S. C. 4 Mod. 187. S. C. *Holt's Cases*, 322. S. C. *Skin*. 342; and see 2 Keb. 178, *Rex v. Wetwine*. S. C. 1 Lev. nom. 203, *Rex v. Wetwang*.

(w) Comb. 433, *Gipps v. Woollicot*. S. C. Id. 464. S. C. 3 Salk. 290, 360.

(z) See, however, 19 E. 4, 4, pl. 13, by Schard, where several and free fishery are distinguished.

(y) *Holt's Cases*, 323, *Gipps v. Woollicot*.

(a) 1 T. R. 358, *Rex v. Old Alresford Inhabitants*.

(a) Id. 361.

(b) *Ibid*.

These seem to be the chief authorities in favour of the united possessions. The opinion of the most eloquent commentator upon our laws must be added in support of the same doctrine. Sir William Blackstone observes, that he who has a several fishery must also be [or at least derive his title from](c) the owner of the soil, which in a free fishery is not requisite.(d) Thus the learned Judge distinguishes the several from the free fishery, as we shall have occasion to notice hereafter.

\*It may not be improper to offer some few short comments on these opinions and authorities; but before we do this, two cases [\*117] shall be mentioned where this very point had almost arisen. In the first an action of trespass had been brought for disturbing the plaintiff's right of several fishery. The evidence in favour of the plaintiffs was, that a grant of the fishery had been made to them from Lord C., with the exception of an oystery. The grantor also reserved to himself the power of taking fish for the supply of his own table. Upon this, it was strenuously insisted, that so far from proof having been made of a several fishery, the direct contrary had been shewn; and the objection being considered valid, the plaintiffs were nonsuited. Another exception was also taken, that it did not appear that the soil had been granted to the plaintiffs, supposing that none could have a several fishery excepting the owner of the soil. On the discussion of a motion to set aside this nonsuit, it was argued for the defendants, that this evidence sustained a claim for a free fishery only; that it was not Lord C.'s intention to have granted an exclusive power; and that, as others had a right to fish as well as the grantees, the latter could not be said to have a several fishery. The Court, however, were of opinion, that although true it was that no person could have a co-extensive right with the claimant of a several fishery, yet that a partial independent right, or limited liberty, as in the case in question, would not derogate from the right of the general owner. And the Court, moreover, evaded the question as to the ownership of soil, Lord Mansfield declaring, that it was the grantor's intention to have passed *every thing* necessary to convey a several fishery to the plaintiffs. As to the reservation of the oystery, it was the same as though the plaintiff had granted the sole right of fishing for oysters to Lord C. And the plaintiffs would have had a several fishery, to all intents and purposes except as to the taking of oysters. This could not be a free fishery, because no one possessed a co-extensive right with the plaintiffs, and there could be no pretence for calling it a common of piscary. Consequently, it was a several fishery; and therefore the rule was made absolute for setting aside the nonsuit.(e)(f)

The point was nearly arising again on a future day. The plaintiff

(c) The words between brackets were not in the earlier editions of the work.

(d) 2 Com. 39.

(e) 5 Burr. 2816, Seymour and others v. Lord Courtenay and others.

(f) If the soil had passed in this instance, the profit of the fishery would have been what we should call territorial; and as there was no proof that the soil did not pass, the particular question did not necessarily press for determination.

sued in trespass for fishing in the River Dove, and obtained a verdict. He had declared upon his possession of a several fishery, and the defendants had pleaded not guilty, with special justifications. The matter might have been brought \*forward on this occasion, because the plaintiff [\*118] was not the owner of the soil; but an accident intervened. The defendants had justified, as servants to one C.; and in the first plea, in which C. was mentioned, they had called him *the said W. C.*, although his name had not appeared before on the record. By reason of this mistake, therefore, it became necessary to amend the pleas, in order that the defendants might avail themselves of their justifications. The plaintiff, on this part, was afraid to risk the point, whether an exclusive fishery could in fact exist separately from the soil; and in consequence of this a compromise was made. It was agreed that the cause should be tried as though there had not been a count for a free fishery, and as if the pleas had been amended; and that the pleadings should be amended in the next term, by consent. Thus it was that the point again went off. (g)

A few remarks may be made here on the inefficiency of the arguments and decisions referred to in the last instance.

With regard to the writs of *monstraverunt* and trespass, which it is said, once lay for the recovery of real property only, to which may be added the old writ of *præcipe quod reddat*; (h) it by no means follows, that because they can be had in cases where a piscary is united to the soil, they may be so used upon every claim of a several piscary. On the contrary, we are informed, that if a *præcipe quod reddat* be brought for a piscary in the water of another person, it will be a bad writ, because a *quod permittat* should be employed as the proper remedy. (i) Therefore, as other than real writs would lie for a fishery, and as it is no where said that *quod permittat* might not have been had for a several fishery, it is fair to conclude, that upon the occasions when these real actions have been brought, the piscaries in question were identified with the soil. That the soil has been frequently joined with a several fishery, in writs, is one consideration; but that a several fishery has never been demanded in any other manner, is obviously quite another. Finally, to use the words of Mr. Hargrave, this evidence of the writs "proves nothing as to the sense of several piscary, without farther explanation." (k) The cases of *Child v. Greenhill*, and *Upton v. Dawkin*, may be disposed of by the same reasoning; for the soil of the plaintiff, together with the fishery, were probably combined in the former case, and *non constat* that if the fishing had been detached from the soil, trespass could have been sustained. \*Then, with regard to the authorities in the Year Books, [\*119] it is certainly laid down in those of Edw. 4, and H. 7, above referred to, that a man cannot have a several fishery unless it be

(g) Dougl. 56, *Kinnersley v. Orpe* and others. See also 1 M. & S. 652, *Rex v. Ellis*, where the question was again alluded to.

(h) Now abolished.

(i) See Mr. Hargrave's note (7) to Co. Litt. 122 (a)

(k) Note to Co. Litt. 122 (a), *ut supra*.

in his own soil : but on the other hand, in answer to this, we have cited cases from the Year Books, where the Judges allowed a replication of prescription to a plea of *liberum tenementum*. Now, as the action was trespass for fishing in a several fishery, a prescription would necessarily have been for a right in *alieno solo* ; and however the form of action was misconceived, such a course of proceeding clearly recognises the several right, independently of the soil.

Smith v. Kemp, and Gipps v. Wallicott, it must be admitted, are likewise decisions against the severing of the fishery from the soil. Yet even upon those occasions, Holt, C. J., seems to have entertained two different opinions as to what should be deemed a free fishery ; while Mr. Justice Eyre gave an entirely opposite judgment. And with respect to the King v. Old Alresford, it seems to prove no more than what might be readily admitted ; namely that the ownership of a fishery will imply a property in the soil, without further explanation.

The Author has forbore as much as possible from venturing on any suggestions of his own ; and as the opinions of the most eminent law writers and Judges are by no means in unison upon the subject, it would be presumptuous in him to do so. By a proper method of pleading, the question will be always evaded, unless a jury should find for a plaintiff who is not owner of the soil, upon the count of a several fishery only ; and it will be time enough then for the Court to decide between authorities which are pretty nicely balanced. Circumstances have occurred, however, under which it has become necessary to ascertain whether the soil has passed independently of the question of fishery. Thus, trespass was brought for breaking and entering the plaintiff's closes, and taking shingle and stones from them. The defendant pleaded not guilty, and gave a deed in evidence by which it appeared that certain persons therein named had granted to him all that messuage, tenement or boat-house, with the gardens, stables, &c. ; and also all that and those sea-grounds, oyster-layings, shores, and fisheries, &c. ; with full and free liberty to fish, dredge, and lay oysters thereon. The question merely was, whether these words comprehended the soil. The plaintiff contended, that a mere easement or privilege was conveyed without more. The defendant, on the contrary, maintained that the instrument passed the soil to him ; and of that opinion was the whole Court. For, generally speaking, the soil passes by the word "grounds ;" and if the grant had only contained the word "sea-grounds," it would have been sufficient. It had been agreed, however, that by introducing the expression "oyster-layings," a privilege of laying oysters was intended to [\*120] pass, and that alone. Those additional words, however were probably introduced because the grantor was uncertain as to the nature of the right which he had actually derived from the Crown. So also, with respect to the word "fishery," it was inserted to remove all doubt as to the extent of the right granted. The additional words, therefore, were intended as words of amplification, and not as words of restriction.(1)

(1) 4 B. & C. 435, Scrutton v. Brown.

Stripped of the difficulty which has been mentioned concerning it, a several fishery is, as its nature imports, an exclusive property. Not but that the territorial owner, or his grantee, or lessee, may give permission to another person to fish, and yet preserve the several fishery; an owner of the above description would still remain seised of his original estate or right, and he would be the several proprietor, although he should suffer a stranger to use a co-extensive or qualified right of fishing with him.

Nevertheless, we are at length in a condition to assume a more certain position as to this much disputed claim.

The point may almost be considered as decided in favour of the independent right. Since the above was written the Court of Queen's Bench nearly decided this much agitated point, and they intimated a strong opinion upon the subject, but they decided against the plaintiff upon a question of pleading. Upon this, error was brought, and the matter seems to be set at rest by the Court of Error. The case was thus: Trespass was brought and declaration stated, that the defendant with force and arms broke and entered the *sole* and *exclusive* fishery of the plaintiff, being the soil of A., and disturbed the plaintiff's fish. It was urged that trespass does not lie for an injury to a several fishery on the soil of a third person [which was, in effect, raising the point, because, if decided in the affirmative, a several fishery may exist independently of the soil.]

The Court inclined to hold that it would so lie, thus affirming the claim, and whether any fish were or not taken. But a difficulty occurred. The declaration had called this the *sole* and *exclusive* fishery: this the Court said was not equivalent to the *several* fishery, and, therefore, the judgment for the plaintiff was arrested. The plaintiff's counsel had also endeavoured to maintain, that after verdict, this might be taken to be a declaration in case, but the Court would not entertain the proposition.<sup>(m)</sup> However a Court of Error reversed this judgment. [\*121] \*They considered the expression, "sole and exclusive," to be equivalent to "several" in respect of the right of fishery, at least after verdict. For the plaintiff must have proved his case at the trial, as to the exclusive right. And they agreed, that trespass would lie though no fish were taken, and they said the plaintiff need not shew further title, *notwithstanding that the declaration had stated the several fishery*, or, sole and exclusive fishery, in *alieno solo*; for there was no warrant to shew that the defendant claimed under the owner of the soil. And they moreover agreed with the Court of Queen's Bench that this declaration must be considered as not in case but trespass.<sup>(n)</sup>

This property in fish usually exists in rivers; but it may be had else-

(m) 8 Q. B. 1000, *Holford v. Bailey*. S. C. 16 Law J., Q. B. 68.

(n) 18 L. J., Q. B. 109, *Holford v. Bailey*, (in error).

where; for a man's stew-pond may be his several piscary; and so it was held in a case where, after verdict for the plaintiff, it was objected that the plaintiff had called the fish of his several fishery pisces sous. But the Court disallowed the motion in arrest of judgment, observing, that they would intend, after verdict, that the place was a stew-pond, which is a man's several piscary, and that even had the matter arisen upon a demurrer the decision would have been the same, by reason of the local property.(o)

It is laid down, that any man may erect a fish-pond, or water wherein fish as kept and maintained, it being a matter of profit, and increase of victuals;(p) and in an anonymous case, Holt, C. J. is reported to have said, that there needs no privilege to make a fish-pond, as there needs in case of a warren.(q) But the lord of a manor would not be justified in making such a store-place for fish, if he thereby disturbed the commonable rights of his tenants.(r)

A question once arose respecting the fish in a stew-pond, whether the heir or executor should have the property. A man bought several carp, tench, trout, &c., and put them in his pond for store, and then died. The Court decided, that the heir should have the fish. Clench, J., inclined to think that the fish were mere chattels, and passed to the executor; but Popham, C. J., replied that it might be so of fish in a trunk, or some "narrow place, where they are put to be taken at [\*122] will, but not where they are put into a pond; and Fenner, J., cited an old case, where an action of waste lay against a guardian in chivalry, for taking fish out of a pond by Magna Charta.(s) It has also been allowed for law, that one may have an action of account for fish in a pond.(t)

An action for use and occupation will lie for a fishing. Upon such an occasion, after a plea of non-assumpsit, it appeared that an agreement had been made with the defendant for a right to angle *only*. It was then objected that this was not within the description of "lands, tenements, or hereditaments" mentioned by the statute, 11 Geo. 2, s. 19. It was a mere personal right and consequently, there should have been a non-suit. But the Court said, there was no distinction, that it mattered not, and they sustained the plaintiff's verdict.(u)

(o) 1 Ventr. 122, Pollexfen and Ashford v. Crispin. S. C. 2 Keb. 757. 765, nom. Ashford and Polixphen v. Chrispen. S. P. Cro. Car. 554, Child v. Greenhill. Though it was said in the case cited in the text, according to Keble's Report, that Greenhill's case had been considered spurious in the Common Pleas. Saywell v. Thorpe, cited 2 Keb. 757. The Court, however, as we have seen, paid no regard to the suggestion.

(p) 2 Inst. 199.

(q) 6 Mod. 183, Anon.

(r) See Cro. Car. 495, Reeve v. Digby.

(s) Ow. 20, Greye's case; and see 21 H. 7, 26.

(t) 10 H. 7, 6. 30. Ow. 20, per Fenner J.

(u) 18 Law J., Exch. 315, Holford v. Pritchard. S. C. 3 Exch. 793.

With respect to a right of several fishery in a navigable river, it has been already treated of in the former part of this Chapter.(v)

We have already seen, that fresh rivers belong to the owners of the adjacent land ; it follows from hence, that they have the fishery also of common right. Each proprietor is entitled to the profit, *usque ad filum aque* ; and, on the other hand, if a party have the land on both sides of the river, he becomes, in common presumption, the owner of the right of fishing according to the extent of the land in length.(w)

But, again, this ordinary enjoyment of the river may be different, for a man may have the river, and others the adjacent soil ; or one may have the river and soil, and a second the free or several fishery.(x)

It is impossible to enter upon the consideration of a free fishery, without the presence of many difficulties. Indeed, the explanations and definitions of this right are as variable, and nearly as numerous, as the points of the compass. Sometimes a free fishery is confounded with a several, sometimes said to be synonymous with a common, sometimes treated as [\*128] distinct from either ; and again we find it mentioned as a royal franchise. Yet, notwithstanding the diversity of opinions, and the discrepancy of authorities, it seems, that to consider the free fishery as the same with common of fishery, will be as reasonable as well as a legal conclusion. It is curious also to notice how well the subject when dispassionately investigated will admit of this interpretation.

In one of the earliest cases, trespass was brought against the defendant, for disturbing the free fishery of the plaintiffs in the waters of T., in a place called G. It was immediately objected, that trespass would not lie for an injury committed in alieno silo. But the counsel for the plaintiffs answered, that they had not claimed common of fishery, but general fishery ; and that a man might have that and general pasture also, in his own soil. And the Court directed the defendant's counsel to answer, saying that the plaint was good enough, without mentioning in whose soil the nuisance was committed ; and that advantage might be taken subsequently of any error respecting the statement of property in the soil.(y) Now, in the above case, it is impossible not to see that free fishery was confounded with a several or exclusive fishery ; for non constat, that because the water belonged to T., he might not have granted it to the plaintiffs ; and in those days it was customary to shew title, instead of declaring as at present upon the possession. In another case in the same reign, where trespass was brought for fishing in a free fishery, the defendant prayed in aid the owner of the soil, who seemed to be the plaintiff ; and then, again, the term free was confounded with several or

(v) Ante ; and see as to ancient demesne, 40 E. 45. Chitty on Fisheries, 304.

(w) Hale de Jure Maris, p. 6, cites Baker v. Hercy, temp. Ed. 1. Owen v. Dunch, vide Tr. 2 Jac. 1 B. R.

(z) Ibid.

(y) 4 E. 3, 48.



territorial fishery.<sup>(s)</sup> The case in the Year Book of Ed. 4, referred to in a former page;<sup>(a)</sup> in which it was said, that a man may grant a free fishery to twenty in his own soil, discloses nothing inconsistent with this idea, that this free fishery would have been a common of fishery.

Subsequent authorities, when impartially considered, tend to the same conclusion. Thus the judgment of the Court in *Child v. Greenhill*,<sup>(b)</sup> proceeded on the ground that the fish had been taken from the *several*, and not the free fishery of the plaintiff. It was an action of trespass for taking fish. While in *Upton or Upjohn v. Dawkin*,<sup>(c)</sup> the judgment was reversed, where the plaintiff had obtained a verdict in trespass for taking trout from a free fishery, because a man has not such a property [\*124] in a free fishery, as to call the fish his own.

In other cases which are referred to in the note, there were counts both for a several and free fishery,<sup>(d)</sup> so that it could not be distinctly ascertained whether the verdicts applied to the one or the other in particular. Then, again, upon another occasion, the declaration charged a trespass in the plaintiff's free fisheries; the defendant pleaded not guilty, and that the fisheries were parcel of a public navigable harbour or creek. The plaintiff protesting that they were not parcel, replied, that he was seised in fee of the Manor of Bohurra, and then prescribed for a free fishery there in right of his manor. A verdict was found for the plaintiff on the general issue, but on the prescription for the defendant. The Court considered that the issue found for the defendant went to the whole of the case. The Court said, that this resembled the case put in argument at the bar, where to an action of trespass q. c. f., the defendant pleads not guilty, and *liberum tenementum* of A., by whose command the defendant entered. The replication deduces a title to the plaintiff under A., which derivative title is traversed and found for the defendant; in which case the plaintiff cannot be entitled to costs, because the issue found for the defendant goes to the whole.<sup>(e)</sup> Here the soil in which the free fishery was claimed, was clearly in another person, and might, therefore, be enjoyed in the same manner as a common. For, now that we are on the subject of common, it may be necessary to observe, that a common of fishery is by no means confined to places where there is a lord of a manor, under whom the tenants of the manor enjoy their respective commonable privileges. These are common lands which a number of persons depasture co-extensively and promiscuously, and these individuals are said to exercise commonable rights, although their property is not situate within any manor. And so if a grant be made to twenty persons

(s) 45 E. 3, 11; and see 3 H. 4, 12.

(a) 17 E. 4, 6, *ante*, p. 115. To the same effect is 7 H. 7, 13.

(b) Cro. Car. 553.

(c) 3 Mod. 97. Carth. 285, cited there. *Peck v. Turner* cited in the margin of Carth. 286, S. P. Same case with *Peck v. Turner*, mentioned in 20 Vin. Ab. 442, pl. 11, in the notes.

(d) 2 Mod. 67, *Wine v. Bidder* and others. 2 H. Bl. 182, *Richardson v. the Mayor and Commonalty of Orford*. 1 Campb. 509, *Rogers v. Allen*.

(e) 11 East, 263, *Vivian v. Blake* and others.

to fish in the soil of another, it might well be called a common of fishery, upon the same principle that the proprietors of common fields are said to enjoy a mutual benefit of that nature when they intercommon together. It might be said, that the commoner is compellable to expend the fish he takes for the sustenance of his family, according to the rule regarding estovers, turbary, &c.; and a free fishery would so far differ from the other, as that the owner of the free fishery might sell or dispose of his fish as he might think fit. This obligation on the commoner, however, is not fully settled; but admitting it to be so (and it is certainly a [\*125] \*very reasonable rule,) there may surely be a common of fishery entirely independent of a manor; for where several persons are found in the possession of a right of fishery co-extensively with each other, the law must call such an user an intercommoning.

Lord Mansfield seemed to consider the right of free fishing, in *Seymour v. Lord Courtenay*,<sup>(f)</sup> as a co-extensive right; and if it be objected that all rights of common are not so ample, it should be recollected, that there are commons without stint; and that if one have a right to pasture or other profit in an equal degree with the grantor, which may be conceded to him provided no injury be done to the other tenants of the manor, this person would have no less than a common without stint. Then, on the other hand, there are stinted commons, as for one hundred sheep, &c.; and so if the owner of a fishery were to grant to another the right of taking one hundred fish at a certain season, that might be called a stinted common of fishery.

But in the case of *Smith v. Kemp*,<sup>(g)</sup> which has been already referred to, the opinion of Chief Justice Holt is certainly at variance with the definition we have attempted to establish. For it is said, that *libera piscaria* is where the right of fishing is granted to the grantee, and then such a grantee has a property in the fish, and may bring a possessory action for them, without making any title. This decision is said to have overruled *Peak v. Tucker*;<sup>(h)</sup> and if so, *Upton v. Dawkin* is likewise shaken by it. But shortly afterwards the Lord Chief Justice held, that a man might have a free fishery in his own soil; as, for instance, that he might have a river in his own manor, and another have a right of fishing there with him;<sup>(i)</sup> and, therefore, upon these inconsistent opinions, we may be justified in saying, that the above determinations are still entitled to respect. And it may be further remarked, that as he alone who has a several or territorial fishery can with justice be considered as having a property in fish before they are caught, it is probable that the first opinion of Lord Holt would apply to an exclusive fishery, granted independently of the soil;<sup>(k)</sup> and with respect to the second, the right of

(f) 5 Burr. 2816; and see 2 Sid. 8.

(g) 2 Salk. 637. 20 Vin. Ab. 442, pl. 11.

(h) Cited Carth. 286, in the notes.

(i) 3 Salk. 291. 360, *Gibb v. Woolliscott*. S. C. With *Gipps v. Woollicot*, cited ante.

(k) But as the Chief Justice denied that a several fishery could exist independently of the soil, we cannot understand him to have intended an interpretation of

free fishery in a man's own soil, might either \*be understood to mean his territorial fishing, or a reservation of a certain limited [\*126] right in a grant of several fishery to another.(l)

It is therefore suggested that a free fishery is no other than an unlimited common of fishery.

The explanation given by Mr. Justice Blackstone of this right, varies from that which has been just mentioned. That learned and elegant commentator distinguishes a free fishery from other rights of a similar nature. He observes, that it is an exclusive right of fishing in a public river, and that it is also a royal franchise, and considered as such in all countries where the feudal polity has prevailed. The Judge differs it from a several fishery, by connecting the ownership of the soil with the latter; and from a common of fishery, because it is an exclusive right, while the common is not; and then, he adds, that a man has a property in the fish before they are caught, which is not the case in a common of piscary. "To consider such right," he proceeds, "as originally a flower of the prerogative, till restrained by Magna Charta, and derived by royal grant (previous to the reign of Richard I.,) to such as now claim it by prescription, and to distinguish it (as we have done) from a several and a common of fishery, may remove some difficulties in respect to this matter, with which our books are embarrassed.(m)

Having already mentioned Mr. Hargrave's opinion upon the subject of several fishery, we will insert his comment upon this illustration of the learned Judge. "Though for the sake of distinction, it might be more convenient to appropriate free fishery to the franchise of fishing in public rivers by derivation from the Crown; and though in other countries it may be so considered, yet, from the language of our books, it seems as if our law practice had extended this kind of fishery to all streams, whether private or public; neither the register nor the books professing any discrimination.(n)

After the foregoing observations, we have but little to add concerning the common of piscary. Indeed we have endeavoured to treat it as the same with free fishery; but as there is no modern decision which can warrant us in uniting them, however reasonable the junction might be, the cases which speak more particularly of such a common have been reserved for this place, and for other Chapters in which it will be found necessary to treat of such a right.

\*A common of fishery is defined to be a right in common with certain other persons in a particular stream.(o) The plaintiff [\*127]

this kind. His opinion, however, might be made to correspond with Sir William Blackstone's definition, namely, the exclusive right of fishing in a public river.

(l) See 5 Burr. 2817.

(m) 2 Comm. 39, 40.

(n) Note to Co. Litt. 122 (a).

(o) 8 Taunt. 187, by Dallas, J. 2 Comm. 34.

complained that the defendant had taken fish in his several water. The defendant justified, as having a common of fishing in the place, where; &c. appendant to a certain house and land, and the Court held his plea to be good.(n)

This common which chiefly exists in manors, was given for the sustenance of the families of the tenants, resulting, like other commons, from the necessity of maintaining and carrying on of husbandry.(o) It may be appendant, appurtenant, or in gross, and in this respect also it agrees with other commonable rights.

The season for enjoying this privilege, and the mode of using it, will be more particularly noticed in a subsequent Chapter.(p) It should, however, be observed, that commoners cannot exclude the lord from fishing without a special immemorial prescription, and that he cannot be absolutely shut out from his own soil; although, upon proof of such a claim of monopoly, the lord may certainly be prevented from taking the fish.(q) And, on the other hand, the commoner has no power over the soil itself, so that his remedy against the lord for disturbing him in the enjoyment of his right, is by action only, and not by abating a nuisance. To use the words of Inglesfield, T. "If I have a common of fishing in your land, I cannot cut down the plants growing by the bank."(r)

Fourthly, and lastly, a fishery in gross is mentioned in some of our books as a distinct right. Yes it does not seem very difficult to refer this privilege also to the more general sorts, either of several or common of fishery. For if it be granted to a person exclusively of others, what is it but a several fishery; and if in common with other individuals, how does it differ from a common in gross, which is attached to the person in contradistinction to appendancy? Being an incorporate hereditament, it cannot be created without deed; and it should be remarked, that if a common of pasture be thus granted over, the character of the right is not altered, for it remains a common, notwithstanding the deed.

[\*128] \*However, this right in gross has found a place in some of the early cases. For instance, where a piscary of common right of appendant was pleaded in bar to trespass for taking fish in a several fishery, Danby said, common of pasture appendant, and common of piscary in gross, are used the one as well as the other.(s) So again, it was said, that the royal fishery of the Banne was not appurtenant, but a fishery in gross, and parcel of the inheritance of the Crown.(t)

There are, as we have already seen, many limited rights of fishing, but these have never been deemed sufficiently distinct to receive a separate

(n) 4 E. 4, 29.

(o) 2 Comm. 35.

(p) Chap. VIII. on User.

(q) See 2 Ro. Ab. 267, *White v. Shirland*; *Chinnery v. Fisher*; *Foiston v. Cratchode*. 1 Inst. 122 (a).

(r) 13 H. 8, 15.

(s) 4 E. 4, 29.

(t) Dav. Rep. 57 (b).

notice. They are either reservations by the owner of the soil, or limited grants by him, and fall naturally, when carefully considered, under some of the general heads spoken of. Thus it was said by Hale, C. J. that in the River Severn there were particular restraints, as *gurgies*,<sup>(u)</sup> &c.; but that the soil belonged to the lords on either side, and that a special sort of fishing was theirs likewise; but that the common sort of fishing was common to all.<sup>(v)</sup> These weirs were reservations out of the supposed original grant by the Crown to the public, and constituted a several fishery as far as their limits extended. So again in the case of the halves and halvendoles, which are certain fishings in the Severn; put<sup>(w)</sup> and wheel fishing were excepted out of the grant,<sup>(x)</sup> and Lord Ellenborough said, that those halves and halvendoles clearly appeared to be of the nature of land, or some local limit within which the fishery connected with the soil was to be exercised. It could not be other than a grant of something territorial.<sup>(y)</sup> The question in the case was, whether the lessee of those halves and halvendoles were liable to be rated to the relief of the poor; and the Court considered that he was, because the grant partook of the nature of real property. Here the excepted put and wheel fishing, was a territorial or several fishery, and so also were the halves and halvendoles, according to the construction put upon those words by the Court, for there seemed to be a considerable doubt as to the real meaning of the terms.

\*In treating of the mode of claiming fisheries, it must be borne in mind that there are two kinds, public and private. With re- [\*129] gard to the former, the nation at large, unless excluded by some prescription or grant, (though instances of the latter must be very rare) may participate in, and claim a right to enjoy them as of common right. Without encumbering ourselves with the difficult and undecided question, whether the sovereign, as universal occupant, be entitled to the soil of public fishing places, or whether some reciprocal contract formerly existed between the King and his subjects, of which (save a few instances) we have no original memorial,<sup>(z)</sup> it cannot but be seen, from the contents of this Chapter, that a general public privilege of fishing may be claimed independently of the prerogative. And further, there seems to be no reason why, if a private owner should admit the public to use his stream indiscriminately, and without hindrance, a dedication should not be presumed on the same principle as a way may be claimed by the like supposition. Owners of piscaries are certainly too mindful in general to suffer any such invasion; but it is not too much to say, that a public user might be justified under such circumstances.

There would, therefore, be two modes of claiming public fisheries, according to this view of things; first, on the broad principle of common

(u) Weire.

(v) 1 Mod. 106.

(w) "The puts are oxier baskets, six feet in diameter at the mouth, attached to stakes driven into the bed of the river, united by wattle, and which stakes are repaired from time to time as they become decayed." 1 M. & S. 654, by counsel.

(x) 1 M. & S. 643, *Rex v. Ellis*; and see post, Chap. XI.

(y) 1 M. & S. 662.

(z) Schultes, p. 129.

right; and secondly, by dedication.(a) And it has, moreover, been solemnly decided, that as the right of fishing in the sea is common to all the people, a prescription for such a right, as annexed to certain tenements, cannot be sustained.

Replevin was brought for taking six boat oars at Creswell Haven. The defendant avowed, that the *l. i. q.* was his soil and freehold, and that the oars were there, damage feasant. The plaintiff pleaded in bar, first, E. C. was seised in fee of a moiety of the *l. i. q.* and that E. C. had given him license to put the oars there, traversing the soil and freehold; and secondly, an immemorial right of common of fishery to fish with two boats in the sea, as appurtenant to divers tenements, of which E. C. was seised of fee, the plaintiff acting as the servant of E. C. There was another plea, very slightly differing from the last, and to these two latter pleas the defendant demurred generally. Issue was joined on the first plea, and a verdict found for the defendant. The principal objection, and [\*180] \*that upon which the Court chiefly founded their judgment, was, because the plaintiff had insisted on his right as a particular right of common appurtenant to certain tenements, whereas it is a general right for any subject of England to fish in the sea of common right. And the opinion of the Court was in favour of the demurrer, thus fully recognising the general privilege, and consequently negating the claim by prescription. Lord Chief Justice Willes, who delivered judgment, said, that it had been decided, that a man should not prescribe for that which the law gives of common right. Now every subject, not only according to the law of this country, but the law of nations also, may fish with lawful nets in the sea or public rivers, and, therefore, the prescription could not be supported. A man might as well prescribe, that he and all those whose estate he has, have a right to travel on the King's highway, as appurtenant to his estate. And so, again, a prescription for fishing as appurtenant to a particular township, would be void; for Grotius says, that the sea is as free as the air. Judgment was accordingly given for the avowant.(b)

Possession seems alone to be necessary. Without it, however, in the absence of a special distinction, there arises no right of action. The plaintiff brought trespass for taking his fish. The defendant pleaded, 1. Not guilty. 2. That they were not the plaintiff's fish, and other pleas. It appeared that the plaintiff had secured a shoal of mackarel, except a small opening, through which, according to the witnesses, the fish could not escape. The defendant rowed up, and took the mackarel which the plaintiff must otherwise have had. There was a verdict for the plaintiff. But upon a rule, the Court directed a verdict for the defendant upon the second and third issues, *i. e.* concerning the possession. For the plaintiff

(a) Or abandonment, as where a prescriptive right in a public river is neglected; but in this case, the change might rather be called a resumption of the public rights. See 1 Camp. 313.

(b) Willes, 255, Ward v. Creswell. S. C. 16 Vin. Ab. 354.

had no possession, and no special custom of that particular fishery transpired.(c)

The legitimate claims to a private fishery are by grant, prescription, and custom, and sometimes an act of Parliament regulates the right of fishing in waters over which it assumes a control; as canals, &c.

Fisheries of this kind are enjoyed either in public or private streams, and it may be remarked, that we purposely omit what may be called territorial fishing; that is where the owner of \*the soil is owner also of the water, because his claim extends not merely to a right of [\*181] fishery, but to the very land itself.

In public waters the privilege arises by grant of prescription. Thus, according to Lord Coke, a man may make a title by usage and prescription only, without any matter of record, amongst other things, to royal fish (d). So again, the Crown has a right to *grant* royal fish at this day, although a grant to exclude the public from taking other fish in a navigable river, or in the sea, would be invalid.(e) And we have seen, that a subject may have an exclusive fishery in an arm of the sea by *prescription*.(f) Though this cannot be claimed under an existing grant from the Crown, for a grant to support it must be as old as the reign of Henry the Second, and, therefore, beyond the time of memory, all the rivers fenced in from the beginning of the reign of Richard I., having been directed to be thrown open by the charters of Henry III.(g)

Instances of claims to fisheries in private waters by grant, or prescription, are sufficiently common. Thus Lord Coke: If a man grant *aquam suam*, the soil shall not pass, but the piscary within the water passes therewith.(h)

Each sort, whether it be a several, free, or common of fishery, may be claimed in the same manner, namely, by grant, prescription, or custom.(i)

Although not every claim made by way of custom can be supported merely on the ground of custom. As where, in the County Court, it was suggested, in answer to an action, that all the inhabitants of a particular place (Bala) had, *as such*, a right to fish. If this were a good custom, the jurisdiction of the County Court was excluded.(k) But the Court

(c) 6 Q. B. Rep. 606, *Young v. Hichins*. S. C. Dav. & M. 592. In Hilary Vacation. In Trinity Term following the plaintiff moved for a nonsuit, or to discontinue on payment of costs, but the Court refused the rule, there being no explanatory affidavit. 6 Q. B. Rep. 606.

(d) Co. Litt. 114.

(e) 6 Mod. 73.

(f) *Ante*.

(g) 1 Campb. 312, n. (a). 2 Comm. 39.

(h) Co. Litt. 4 (b). See as to this passage, *ante*, in this Chapter.

(i) It is said that the King may create, amongst other things, a fishery, by way of ordinance, without a grant to any one. 2 Ro. Ab. *Rperog.* 197, pl. 4.

(k) See 9 & 10 Vict. c. 95, s. 58.

were quite clear that this was a bad custom, and the rule for a writ of prohibition was discharged with costs.<sup>(1)</sup>

The following case will serve to shew that such a right, when severed from the soil, being an incorporeal hereditament, cannot be created without deed. Trespass was brought for breaking and entering the [\*132] plaintiff's close, called the River Dart, and taking the plaintiff's fish therein; the second count charged a trespass in the plaintiff's several fishery; the third, in his free fishery; the fourth was trespass *de piscibus asportatis*. The defendant pleaded not guilty, and at the trial a verdict was entered for the plaintiff on the second and fourth counts only. The evidence for the plaintiff was, first, letters patent of 44 Eliz., by which, amongst other things, the Queen granted "all waters, fisheries, &c., to the aforesaid manors, &c., belonging or appendant." Two chirographs of fines were next produced, which spoke of a several fishery in the River Dart. It was further proved, that the plaintiff received an annual rent for his fishery from different tenants, and that no other person claimed a right to fish within his limits; but that the defendant committed the trespass complained of within those limits. The defence was, that one M. was lessee of this fishery under the plaintiff, and in possession at the time of the trespass, and that the action ought to have been brought in his name, and not in that of the plaintiff. An agreement in writing, not under seal, was then produced, by which it appeared, that the fishing in question had been let to M. for three years, upon the payment of a certain rent therein mentioned. The learned Judge considered, that there was evidence for the jury to presume a grant of the exclusive right of fishing in the Dart before the reign of Henry III.,<sup>(\*)</sup> and that, as it was a right in a navigable river, where the tide flowed, and reflowed, it was an incorporeal hereditament which lay in grant and not in livery, and so that a term of years could not be created in it without deed. Liberty having been reserved to the defendant to enter a nonsuit, a rule was obtained for that purpose. But the Court held, that M., the lessee, took nothing in this case under the agreement, that the plaintiff's right remained in him at the time of the trespass, and, consequently, that the action was maintainable. According to the fines (which were probably in the language of the original grant), the plaintiff had nothing more than a fishery, without the property of the soil, or the water. The agreement purported to grant the fishery only, and not being under seal, it could not operate as a demise for years of that which lies in grant.<sup>(n)</sup>

This decision however, by no means prevents a person, who has permission to fish under a parol license, from justifying in trespass as servant to the owner of the fishery.

(1) 6 C. B. 81. 5 D. & L. 784. 17 Law J., C. P. 206, Lloyd v. Jones.

(\*) That is, before Magna Charta.

(n) 5 B. C. 875, The Duke of Somerset v. Fogwall. S. C. 1 D. & R. 347. To the same effect is 6 Ad. & El. 824, Bird v. Higginson.



A grant of water, excepting the fishery in it, will be a good [\*188] exception of a *sole* fishery, where the lessor is in the enjoyment of a sole fishery. No new easement was held to be reserved where A. granted a mill with all waters for working, &c., and then excepted the fishery. The plaintiff, therefore, could maintain trespass against the miller.(o)

With respect to a common of fishery, it is observable, that, if prescribed for, a grant is presumed to have existed in the first instance, for prescription presupposes a grant. It has been determined, that a grant of such a common is good, although there be a reservation of part of the water for a particular purpose. Thus, upon an assise brought, it appeared, that a person seised of the manor of W., to which the fishery in question was appurtenant, had granted the manor and fishery to the plaintiff, reserving a mill-stream. It was understood that the soil had not passed, because the plaintiff only claimed common in the water; but it was objected, that by retaining the mill-stream, the grantor had in effect retained the fishery also. But the Court gave judgment for the plaintiff, and Thorp observed, that as this was a grant of all the piscary, except in the mill stream, the defendant ought to leave the plaintiff in quiet possession of the former, as he had the benefit of the reservation of the mill-stream.(p)

A corporation claimed an oyster fishery, and sued the defendant for damage done to it. It appeared that in 1740 they became, by ouster, incapable of continuing their functions in managing the fisheries, but in 1763 they were reincorporated, and all fisheries, amongst other things, were restored to them. Here, as there had been no actual dissolution, the ancient fishery remained in them, and did not pass to the Crown.(q) It also appeared that the corporation had granted a license in writing to certain dredgers to dredge for oysters during the season. It was held, that this did not operate as a demise so as to take away the possession from the corporation.(r)

Sometimes an act of Parliament directs how the profits of a fishery shall be taken.

Thus in an action of account, the plaintiffs alleged, in their declaration, that they and the defendant held, as tenants in common, nine acres of land covered with water, and a fishery; that the defendant had the management thereof to take the fish, \*and, that as bailiff to the plaintiffs, he ought to have rendered a reasonable account of [\*184] what he received beyond his just share; but that he had never accounted. It appeared, that the plaintiff and defendant were separately possessed of

(o) 3 Dougl. 43, Lord Paget v Milles.

(p) 34 Ass. pl. 11.

(q) Whether, after Magna Charta, the Crown could have regranted the fishery, *Quære?*

(r) 7 Q. B. 339, Mayor, &c., of Colchester v. Brooke.

two pieces of land, containing each about four acres and a half. The proprietors of the Birmingham Canal had converted them into a reservoir, under the provisions of an act of Parliament.<sup>(s)</sup> There was a regulation in favour of the plaintiff and defendant as to taking the fish in the reservoir, to the following effect, namely, that the owner or owners of the land on which any such reservoir might be made, might let all the water out of the reservoir once in seven years, for the purpose of taking the fish therein, the water to be so taken out in the month of November, and no other time.<sup>(t)</sup> It was contended, that the plaintiff and defendant were tenants in common of the septennial fishery hereby created, although they were separately interested in the lands; but the learned Judges considered, that the interest in the fishery was also several, and that each party was entitled to have the fish left on his own land when the reservoir was exhausted. Under this impression a nonsuit was directed, which it was afterwards moved to set aside, and enter a verdict for the plaintiff. It was contended, that, as the fish would go along with the water as it ebbed, and be finally stranded on the land of that party that was lowest down the stream, there could be no reasonable division, unless there were a tenancy in common. But the Court thought this a general right of fishery, and that each party must take his chance of the fish left aground upon the exhaustion of the reservoir; and the rule was refused.<sup>(u)(v)</sup>

[\*135]

## \*CHAPTER VI.

## OF MILLS.

It is proposed to devote a short Chapter to the consideration of water mills, as an introduction to the subject of watercourses, which will be entered upon immediately afterwards.

There are several kinds of these mills, as corn mills, paper mills, fulling mills, &c.;<sup>(a)</sup> but it is with such as grind corn that we have chiefly to do in this place, and more especially, again, with ancient buildings of

(s) 31 G. 3. c. 59.

(t) Sect. 11.

(u) 1 Bing. 202, *Snape and Wife v. Dobbs*. 8 Moore, 23, S. C. However, the reporter adds a note to the effect that the canal proprietors had absolutely purchased the nine acres, and that consequently, the fishery must be theirs, and not that of the parties in the cause.

That a fishery may be extended under a statute staple. See 2 H. 4, 8, pl. 42.

(v) It seems that a plaintiff, in an action of trespass for fishing in his general fishery, is not entitled to full costs without a certificate, if his damages be under forty shillings. But it is said that he would be entitled to costs, at all events, in trespass to his free fishery, in conformity with the decision respecting free warren, which, being collateral to the land, the title of the freehold respecting free warren, come in question. *Chitty on the Game Laws*, pp. 21. 307.

(a) See 2 Inst. 621.

this sort. Customs, or prescriptions, of considerable value, are frequently attached to these old mills, and, as we shall see by and by, if created before the ninth year of King Edward II. (when the statute *Articuli Cleri* was passed) they did not pay tithe. Moreover the mill cannot be changed in many instances without a risk of losing the privileges which are appended to it.

In ancient times, before the necessities and conveniences of life were supplied in such profusion as at present, it became important to the settlers in and inhabitants of different districts, that they should have free access to some mill for the purpose of grinding their corn. This easement was indispensable, because they required in the first instance, sustenance for their families; and in some cases there might have been an obligation to grind the lord's wheat for his use. Lords of manors, therefore, for the purpose of meeting this exigency, erected mills on their respective domains for the public advantage; but they fettered their gift with this condition, that the inhabitants and residents within their respective seignories should bring their corn to be ground at the mill so built up; and this custom, which thus had a reasonable commencement, was called doing suit to the mill. Consequently whether the millers, to whom the respective lords conceded these advantages, make their claim by prescription, which supposes a grant from the lords, or by custom, it seems clear, that this old practice arose originally from a sense of general convenience; and in so strong a point of view does this seem to have been considered, that a man might have claimed [\*136] the suit by prescription even from the villeins of a stranger.(b)

In process of years, however, when commerce began to spread, and new erections were prospering on every side, many of the tenants and inhabitants, whose ancestors had derived benefit from the ancient mills, began to employ their own particular workmen, and the old millers found themselves deserted by degrees by those whose duty it was to have continued their support. They were, therefore, necessitated to seek redress, and the writ of *secta ad molendinum*, or *secta molendini*, was the ordinary remedy which they employed upon those occasions. The enforcing of this writ, which is now superseded by the modern action on the case, brought back the inhabitants to the suit and service which they owed.

Again, on the other hand, the millers would sometimes stretch their prerogative too far; and not content with the suit of the tenants and neighbours, would endeavour to lay claim to a more extensive limit than they ought, and thus it was that they were now and then defeated upon one side or the other to try the validity of their customs; or they would even trespass on the rights of the inhabitants, and instead of confining themselves to the usual demand of having all the corn ground at their mills which would be afterwards used in the family, they strove to in-

(b) F. N. B. 122.

clude within their custom all the corn sold or spent in the neighbourhood. This being an unreasonable custom, was rejected by the Courts.

These customs are appendancies to the mills to which they belong, so that he who is seised of the mill becomes of course entitled to the suit: Thus, where the Prior of Watton brought an action for suit to his mill against the Abbott of Meux, it was said, on the part of the plaintiff, that the suit was claimed as appendant. And by the Court, whoever is seised of the mill, shall have the suit; and if the plaintiff have no title, that will come by way of reply. It was then claimed from time immemorial, and, therefore issue was joined.(c)

We have said, that disputes occasionally took place in former times respecting the erection of new mills. Thus, the Prior of Nedeport brought an action on the case against one J. W., and counted that he was lord of S., and that he and all his predecessors, lords of the same vill, had had three free mills there from time immemorial, and that no one else had ever possessed [\*187] a mill there beside. He counted moreover, that all the Prior's tenants in the vill, and all the other residents, had been used to grind at those mills; but that the defendant, one of those tenants, had built a horse mill within the limits, and that the inhabitants ground their corn at the new mill to the damage of him the said Prior. In this case, although there were some technical objections to the right of the plaintiff to recover, the general doctrine as to the right of requiring suit was recognised. And Newton, C. J., put the diversity very clearly between mills erected on different manors, and a mill set up in opposition on the same manor; and again between the remedy which lay against such as ought to do suit to a mill, and the course to be adopted towards the builder of a mill. Thus, he said, that he who had a freehold within the same ville might build a mill upon his own demesne land, and, as far as the building was considered, it would injure no one. For if there should be two lords of a vill, with lands lying alongside a river, and one have had a mill upon that river from time immemorial, and the other not, and then if the latter should build a mill upon his own soil, and on the same river, the first lord would have no remedy, provided there were no disturbance of the water, nor any superabundance of stream occasioned by the new works, so as to drown the other's mill. But, added the Chief Justice, there shall be a remedy against such as owed suit to the ancient mill, and who, notwithstanding, would go to the new.(d) Yet, if one of the *tenants* of the manor set up such a mill, it seems that an action would lie, because the tenant is bound by the custom and prescription, and by acting thus he would offend against the privity of the custom.(e).

A newly erected house is within the custom. It was so held in the

(c) 17 E. 3, 64.

(d) 22 H. 6, 14. Hutt. 100. See Ridgw. 319.

(e) That if a mill be set upon posts, waste lies not for it, and that there may be a copyhold of a mill. See 4 Leon. 241, Ward's case.

Exchequer; and, further, that excessive toll or neglect to grind the corn when sent, were the only excuses for not employing the miller.(f)

It is, however, worthy of notice, that the tenant in this case erected the mill within the manor; had he done so out of the manor, the decision might have been different, as the following case will shew. A bill was filed in equity, and it appeared that a manor was held of the King in fee-farm, and that there was a custom within the manor, that all the tenants and resiants therein should grind all their multure of corn and grain baked and brewed in their houses at the lord's mill, and not elsewhere; \*and that the defendants had erected another mill, out of the [\*138] manor, near the other mill. The bill went on to say, that in consequence of this, many of the tenants and resiants of the manor ground their corn and grain at the newly-erected mill out of the manor, to the prejudice of the lord's mill. But the Court held, that any tenant might set up a mill out of the manor upon his own ground, but not within the manor; nevertheless, it was further held, that if the owner or tenant of the mill should cause or persuade any of the tenants or resiants within the manor to grind there, or fetch any grist out of the manor to his own mill, he might be prohibited by a decree of the Court. The bill was ordered to be dismissed unless precedents were shewn the next Term, and then, in default of precedents, the bill was dismissed without prejudice to the right of the lord of the manor.(g)

But to proceed with the cases on valid customs: the general liability of tenants of a manor to grind at the lord's mill was seriously considered in an action upon the case for erecting a mill, and the custom relied on by the plaintiff, the lord of the manor, was, that all resiants and inhabitants within the manor should come and grind at his mill. It was objected, that the custom had been laid too generally, namely, for every inhabitant, &c., to grind at his mill, that it had been too largely claimed as a custom to grind all the corn, and other questions were raised upon the pleadings. But notwithstanding these difficulties, the Court were of opinion with the plaintiff. Coke, C. J., observed, that it was a very strong case, and that the custom was good. Croke, J., of the same opinion. Mr. Justice Doderidge said, that suit to a mill might be by reason of tenure or service, but that the same might be by custom, and might well be among strangers. Haughton, J., also held the custom good, for the party charged had a benefit by it, and thus the old rule was verified,

*Lex plus laudatur, quando ratione probatur.*

The Court being clearly of opinion that the custom was good, judgment was given for the plaintiff.(h)

(f) Hardr. 177, *Seintley v. Bendel*. Mich. 3 Car. 1, cited there. S. P. 2 Ventr. 286, *Chapman v. Flexman*.

(g) Hardr. 174, *Green v. Robinson and another*.

(h) 2 Bulstr. 195, *Hix v. Gardiner*. S. C. 1 Ro. Ab. 559, nom. *Higges v. Gardiner*.

It should be observed here, that the Court, and not the jury, are to decide upon the reasonableness of such customs.<sup>(i)</sup>

[\*139] So, again, the plaintiffs brought an action on the case, for \*that being seized of certain water corn mills, they had immemorially ground all the corn of the tenants of the manor, spent in the house of such tenants, at these mills; and they further declared, that the mills were kept, and had been kept in constant repair. Nevertheless, the defendant was accustomed to have his corn ground at other mills, so that the plaintiffs had lost the toll of their corn. Here the custom would have been considered reasonable enough, if it had not been claimed rather too largely; for by Twisden, J., the defendant, under this prescription, cannot spend any corn in his house unless it be first ground, and so he cannot feed any poultry, or give any to his cattle, &c., unless it were ground at the mill. Judgment was, therefore, given for the defendant. Another objection was, that the plaintiffs had joined in one action, although their interests were several, but it was overruled, inasmuch as the not grinding was an entire joint damage; for otherwise, were they to bring several actions, the damages would be twice recovered.<sup>(k)</sup> The proper mode of pleading, says Mr. Serjeant Williams, would have been to lay the prescription "for all the corn and grain after the grinding thereof, or ground, or spent," &c.<sup>(l)</sup> And in the report of the above case in Ventris, a decision is there cited, in which the matter is said to have been so adjudged.<sup>(m)</sup>

So, again, the plaintiff declared upon his seisin of several corn mills, sufficient to grind the corn of the inhabitants within the manor and burgh of Torrington, and he then shewed the suit and service of the inhabitants to these mills, and that the defendant, being the occupier of an ancient messuaga within the manor and borough, erected a mill within the manor and borough, where he ground many bushels of malt, and spent them in his house, so that the plaintiff was deprived of the benefit of the toll. The Court held the custom good.<sup>(n)</sup>

So again, an action on the case was brought upon the possession of a certain ancient water corn mill in Yorkshire, and the plaintiff alleged, that by reason thereof he ought to have toll of all corn ground in that mill. The custom declared upon was, that all householders within the parish of B. were bound to grind all the corn used and expended in their respective houses, at the plaintiff's mill, and to pay a reasonable toll to [\*140] the plaintiff for the same. It was then stated, that the \*defendant was a householder in B., and inhabited a dwelling-house there, but that he had withdrawn his grist from the mill, and had caused

(i) 6 M. & S. 69, *Gard v. Callard*; and 2 Inst. 222 was cited.

(k) 2 Saund. 114, *Coryton v. Lithebye*. S. C. 2 Lev. 27. S. C. 1 Vent. 167. S. C. 2 Keb. 631. 803. 822. 838.

(l) 2 Wms. Saund. 117, f. n. 3.

(m) In B. R. 1654, *Aylett v. Charlesworth*, 1 Vent. 168, cited there. S. C. Sembl. nom., *Alant v. Janen*, cited in 1 Lev. 15.

(n) 2 Vent. 286; *Chapman v. Flexman*, in error.

a great quantity of his corn to be ground at other mills, such corn being subsequently expended in his house. These allegations were proved at the trial. The defendant did not controvert the usage, but set up as his defence an extinguishment of the right by unity of possession. This point, however, failed him, as we shall see in the Chapter on Extinguishment, and a verdict being found for the plaintiff, it was argued on the defendant's behalf, that the custom was not good. But by Willes, C. J., who delivered the opinion of the Court: this is exactly the same custom as is stated in *Higgs v. Gardener*, in 1 Ro. Abr. 559, pl. 4.(o) It is good; although the inhabitants be not tenants, for the custom might have a reasonable commencement by agreement at the erection of a mill. And Lord C. J. Coke had said, that though no reason can be given for the beginning of any custom, yet, non sequitur that the custom is unreasonable at the beginning of it, for, for some things no reason can be given. The plaintiff, consequently, had judgment, the other point made against him being also overruled.(p)

Notwithstanding these authorities, it was determined in a much more modern case, to resist the validity of the general custom, on the ground; among other objections, of its being an invasion of the liberty of the subject. The plaintiff was possessed of certain water corn mills within the manor of Settle, in Yorkshire, and he claimed the corn and malt of all corn, grain, and malt ground at those mills. The custom alleged, was for all the tenants, inhabitants, and resiants, within the manor, to grind all their corn, grain, and malt, used, spent, or ground, within the manor at the plaintiff's mills, and not elsewhere, for the consideration of certain reasonable toll. The complaint made was, that the defendant being a tenant, inhabitant, and resiant within the manor, knowingly used and spent corn within the manor, which had been ground elsewhere than at the plaintiff's mills. Some decrees of the Court of Exchequer, establishing the custom were put in, together with certain proceedings on a scire facias, to revive the decree against some of the then inhabitants. The plaintiff's miller proved an acknowledgment by the defendant, that he had used American flour, and that the defendant, though in substantial circumstances, had ground but one load of malt at the plaintiff's mill in nine months, and one load of wheat only during four years. Upon a demurrer to the evidence, it was urged strongly for the defendant, that if the custom, as laid, extended to a prohibition from [\*141] using corn, or malt, which had come already ground into the possession of the inhabitants, as flour, malt, &c., it was so unreasonable a restraint on the liberty of the subject, as could not be supported in law, for then such flour could not be used unless made at the plaintiff's mills, even if received as a present, or in charity. There were several other objections; but the Court disallowed them all, and said, moreover, that it was not competent to the defendant to question the validity of the custom, on a demurrer to evidence. The objection having been renewed on a motion to arrest the judgment, Lord Mansfield observed that there certainly had

(o) *Ante*, p. 138.

(p) Willes, 654, *Drake v. Wiglesworth*.

been a doubt as to the extent of the custom, whether it went only to corn growing in the manor, and ground there, or to all ground corn wherever it might grow, and which should be consumed within the manor. But the answers in the Court of Exchequer shewed, that the defendant had then insisted on the restrained sense, and that they were not bound, to grind corn which grew out of the manor of Settle Mills; and as the decree established the custom to the more enlarged extent, it proved that the custom was reasonable. The rule for arresting the judgment was accordingly discharged.(g)

So again, a custom, binding the tenants and residents within a manor to grind at the lord's mill all their corn and grain, which they use, ground, in their dwellings, was held not to prevent them from buying and using in their dwelling flour produced from corn ground at other mills; and Abbott, C. J., observed, that he thought *Ord v. Buck*(r) precisely in point.(s)

Several objections were taken to a custom in an action brought by the mayor and commonalty of Liskeard, for not grinding at their common mills. First, it was said, that the house where the defendant inhabited, was not held of the mayor and commonalty. Secondly, that it did not appear that the commonalty were bound to repair the mill, or that they constantly kept grinders and loaders. It was said however, that an action had been [\*142] previously brought upon the same custom, \*and that it had been holden good; and Roll, C. J., observed, that he considered this to be a good custom, and so the plaintiff had judgment.(t)

The Court of Chancery has been frequently applied to for the purpose of obtaining decrees to enforce customs of this nature. And it is competent for the miller to apply to the Court, by a bill for an account of toll due, although the custom may have been established by a former decree. It was insisted upon such an occasion, that the plaintiff's remedy was only at law, but the Vice Chancery referred to authorities in favour of the jurisdiction of the Court, and declared himself satisfied of the full right which he possessed to protect the custom. His Honor, nevertheless in the case before him, held it the better course to leave the case open, and retain the bill, with liberty to the plaintiffs to bring their action at law, not because he had any doubt as to the confirmation of the decree, but because it appeared that the old water and horse mills had been converted into a steam mill, and also because it might be doubtful whether

(g) Doug. 218, *Cort v. Birkbeck*. A note of the Manchester mills case, decided in the Duchy Court, 21st May, 1717, before Lord Mansfield, and Clive, J., assisting the chancellor, was read by Wood for the plaintiff arg. as being exactly in point. Id. 221. This case of the Manchester mills, was the *Earl of Warrington v. Sir Oswald Mosely, Bart.*, 4 Madd. 114. See 8 Bro., P. C. 106. *Ord. Att. Gen. of Lancaster and others, appellants, Buck and others, respondents*.

(r) 8 Bro. P. C. 106.

(s) 2 B. & C. 827, *Richardson and other v. Walker*.

(t) Sty. 421, *Kemp v. Gord*.



crushing malt, were within the custom of grinding. Those were questions of law.<sup>(u)</sup>

The principle upon which these decisions have proceeded is, that lords of the manors, in the first instance, erected mills for the convenience of their tenants, and that the millers derived their title to the exclusive grinding either by prescription, which presupposes a grant from the lord, or a custom which was not considered unreasonable. When, however, they came to encroach, and endeavour to enlarge their rights, they were in their turn foiled and compelled to rest satisfied within the limits of their original grant. As in the case mentioned some time since, of the tenant who built his mill out of the manor, where he was justified in so doing, and the bill against him in equity was dismissed.<sup>(v)</sup> Again, the plaintiff and his wife brought an action on the case against the defendant, and declared, that the Bishop of Salisbury was seised in fee in right of his bishopric of four mills within that city, and that there was therein a custom for all the inhabitant residents within the city, in an ancient house holden of the bishop, to have all the grain spent in their messuages, or sold, ground at those mills, and not elsewhere, without license. Further that they had been used to grind and \*pay for the grinding, and [\*148] that in consideration thereof, the bishop had been accustomed to keep servants to grind, and loaders to carry, and that the bishop by demise conveyed the mills to the plaintiffs. The plaintiffs then said, that the defendant, who was dwelling in an ancient house, took not only grain spent in his house, but also such as he exposed to sale, and had it ground at another mill, to the injury of the plaintiff. Upon the issue of Not Guilty, a verdict was found for the plaintiffs; but, notwithstanding, judgment was subsequently given against them. For, first, the custom was unreasonable. The reason for such a custom was, that the corn ground by any one within the limit, should be ground at those mills, and not elsewhere; so that both sides were bound by the custom, the one to bring corn there, and to no other place, the other to maintain the mills and all provisions for grinding; and in default on either side, actions would lie. It was moreover, holden, that this custom would be good as well for corn brought, as for corn growing within the town, provided it were spent within the houses. Though in a *secta molendini* by the tenure it would not be so.<sup>(w)</sup> But by the custom insisted on, if a man buy corn he cannot sell it again in corn in his house, for it must be ground at those mills. The breach, therefore, being assigned as well in corn sold as spent, the plaintiffs could not recover.<sup>(x)</sup> And had it been assigned in corn spent only, it would not, in

(u) 4 Madd. 83, *The Duke of Norfolk v. Myers*. The custom in this case had been previously established by *Walmesley v. Marshall*, Hil. Term, 3 Car. 1, cited 4 Madd. 105; and *Lady Petre v. Clarkson*, cited in *Id.* 106. S. P. *Pilkington v. Webster*, Duchy Court of Lancaster, 1761, cited 4 Madd. 115.

(v) *Ante*, p. 138.

(w) Should the writ of *Secta Molendini* be abolished by Parliament, it will still be necessary to set out a custom or prescription correctly, or to give proper evidence of it; and the observation in the text will continue to be law.

(z) *Hob. 189, Harbin et Ux. v. Green*, Mo. 887, S. C. 1 Browl. 18, S. C., cited

my opinion, says Lord C. J. Hobart, have served, because the custom itself being entire, is totally void, though some part of it alone might be good in law.(y)

So again, it seems, that the grinding at a new mill might be justified, if excessive toll be taken, or if the grist be not ground within a convenient time.(s)

And if there be neither tenure nor custom, an exclusive claim of this sort can hardly be sustained. As where a bill was preferred in equity for the demolishing of a mill near to one of the King's manors, which was [\*144] granted to the plaintiffs in fee \*farm. The farmers had mills there, and it was said, that the mill complained of was a prejudice to them, by reason of its being so near; but the Court desired that precedents might be searched for, to warrant the granting of such a decree in the absence both of tenure and custom. No precedent was found.(a)

After the preceding observations, it may be collected without difficulty that the chief methods of claiming this suit to mills, are by virtue of tenure, by prescription, and sometimes by the King's prerogative. If the suit be claimed from tenants, it should be demanded by reason of tenure; but in the case of residents, by prescription.(b) If the suit be claimed by tenure,(c) it cannot be severed from the manor without extinguishment; but where by custom or prescription, it seems that the severance will not affect the right.(d) And it has been said with respect to a suit to a mill, that if it be good by way of tenure, it is so *a fortiori* by prescription and custom.(e)

And by Haughton, J., where the party has his tenement, he has benefit by this; and this custom is reasonable, as well upon a tenant as on a stranger.(f)

The King's prerogative, moreover, will extend to compel suit to a mill within his manor, for it is a personal prerogative, and cannot be had by any other lord without tenure, custom, or prescription. But in the same case in which this law was laid down, it was held, that a fee farmer might take advantage of the prerogative, because it would be for the King's benefit.(g) And this rule holds in the case of the King, if he have a

Sty. 421, in *Kemp v. Gord*, cited also Hardr. 68. See also Hardr. 67, *Vaughan v. Mansel*, where the Barons of the Exchequer were divided in opinion upon this point. See Likewise 6 M. & S. 69, *Gard v. Callard*. And in *Harbin v. Green*, there was another fatal error. The neglect alleged was from 2 Jac. to 12 Jac., but the plaintiff only made title from 11 Jac., and the damages were entirely assessed.

(y) Hob. 189. S. P. Willis, 654, recognised in *Drake v. Wiglesworth*.

(z) Hardr. 177; and see post, Chap. IX.

(a) Hardr. 184, *The Mayor and Burgesses of Scarborough v. Skelton*.

(b) F. N. B., by Hale, 122, n. (c).

(c) 4 Rep. 88.

(f) Id. 196.

(d) Hardr. 21.

(g) Hardr. 177.

(e) 2 Bulstr. 195.

manor by wardship only, within which manor there is a mill, and although the tenant be not otherwise bound by tenure or prescription.(h)

A covenant to do suit to a mill will run with the land as long as the mill and the premises in respect of which suit is done, belong to the same person. Consequently, the assignee of the lessor may sue. The unity of title had great weight in promoting this decision.(i)

A fulling mill, with the watercourse and flood-gate, were devised \*to a trustee for ninety-nine years, for the use of certain persons. [\*145] There was an exception or free liberty for the lessor, his heirs, &c., at all times, at pleasure, to divert the water from the mill, for watering all meadows which they should think proper, and to take up and put down all proper sluices. Part of the profit of the mill consisted of water rents for flooding meadows, for water which was wholly diverted from the mill. It was held, that under this exception the heir of the lessor was entitled to the water rents, the exception not being repugnant to the grant.(k)

Under a grant of a mill, a millstone, though severed, "*et soit en pile-out*," will pass.(l)

Some observation concerning the use of mills; the remedies for injuring or misusing them; the extinguishment of privileges attached to them, &c., will be noticed in future Chapters.(m)

## CHAPTER VII

[\*146]

### OF WATERCOURSES.

A WATERCOURSE may be either a real or an incorporeal hereditament. If by grant, prescription, or otherwise, one should have an easement of this kind in the land of another person, it would partake of the latter quality; but if the water flow over the party's own land, although indeed it cannot be claimed as water, yet it is in effect identified with the realty, because it passes over the soil, and *cujus est solum, ejus est usque ad coelum*. For example, a miller may purchase the water adjoining to his mill, as an easement, the soil being left in the hands of the original proprietor; and in that case he would gain an incorporeal hereditament; but if he were to buy the land itself over which the water flowed, he would

(A) F. N. B., by Hale, 122, n. (b).

(i) 1 B. & C. 410. Vyvyan v. Arthur.

(k) 3 Smith, 84, Lambert v. Bennet.

(l) 1 Ro. Rep. 101

(m) In ejectment for four mills it was not stated whether they were wind or water mills, but this omission was held immaterial, at all events, after verdict, 1 Mod. 90, Fitzgerald v. Marshall. S. C. 1 Vent. 206. 2 Keb. 875, 3 Keb. 44.

then have a corporeal tenement, and the right which he would possess in respect of his watercourse would be real. The case is analogous to that of fisheries, where a person is the owner of a several fishery, being at the same time possessor of the soil, he has a real hereditament; but if his claim were limited to a free or common of fishery, his privilege would be merely incorporeal. Amongst the legal significations of land, Lord Coke mentions "waters;"<sup>(n)</sup> and this expression, observes Sir William Blackstone, may seem to be a kind of solecism, but "such is the language of the law." Therefore an action cannot be brought to recover the possession of water by the name of water only, but it must be brought in respect of the land which lies at the bottom, and the description of it must be, so much land covered with water.<sup>(o)</sup>

It should be added, also, that a watercourse means a private right, as distinguished from the public enjoyment of the sea, or of navigable rivers; although, at the same time, if it have been immemorially enjoyed in a public river as an easement, the law will secure the quiet possession of it to the owner. Lord Ellenborough made the distinction between the public and private right to the water of a river in a case against the Bristol Dock Company. Being told by counsel that there were [<sup>\*147</sup>] instances where persons had acquired a right to use the waters of rivers for their own purposes, the noble Judge said, that there were cases where special rights in the water had been acquired by way of particular easement to properties and not merely a use, which was common to all the King's subjects.<sup>(c)</sup>

A right in the occupier of an ancient messuage to water his cattle at a pond, and to take the water for domestic purposes for the more convenient enjoyment of his messuage, is an easement, and not a profit à prendre in the soil of another. But if such a right were a profit à prendre, an allegation that the water was to be for the more convenient use of the messuage is a sufficient limitation of the right claimed, on general demurrer.<sup>(d)</sup>

Grants or prescriptions, which presuppose grants, are the foundations of the right to watercourses; for by a watercourse, we here mean a private right of water. Therefore, as the soil beneath a stream which is not a public navigable river, belongs to the owners of the land on either side, *ad medium filum aquæ*, it must be shown, that they have consented to the enjoyment of the water as claimed, or that the easement in question has been used immemorially; and then a license on their parts will be presumed. However, an adverse possession or dominion over the soil for twenty years, will be sufficient to bar the action of ejectment; and, after a long user of the water of the stream, inasmuch as the Court will be

<sup>(n)</sup> 1 Inst. 4.

<sup>(o)</sup> 2 Comm. 18.

<sup>(c)</sup> 12 East, 429.

<sup>(d)</sup> 5 Ad. & El. 758, *Manning v. Waddale*. S. C. 1 Nev. & P. 172.

disposed to consider that a permission had been conceded to those who enjoyed it, a license might be effectually pleaded in bar to an action of trespass.

And a possession of sixty years, as we shall find, has been deemed sufficient to enable the party to bring his bill against a mortgagee who foreclosed the equity of redemption in order to be quieted in that possession, without having established his right at law.

With regard to the doctrine of acquiescence for any length of time, (as for twenty years,) in a particular mode of enjoying water, it is observable, that there may be a possession, not only as against the owner of the land adjoining, whose right includes the property of the river, but also as against those whose lands lie further down the stream; and, thirdly, there may be such a possession as against strangers. The two latter modes of possession will come under consideration hereafter, when we come to speak of obstructions; but with respect to the former, \*it should seem, that an enjoyment of twenty years would be, although not conclusive, yet strong presumptive evidence of a [\*148] grant from the owner of the soil.

And a right to a watercourse may be established, although an interruption has actually occurred within twenty years.(e)

No length of time will substantiate a right to exclude the public from the use of a navigable river, for there the rights are quite different, the soil being in the Crown, and the user the common inheritance of the people at large.

It may be added here, that a watercourse devoted to public purposes cannot be dispensed with as long as the public benefit is required. The stat. 27 Eliz. c. 20, gave authority to the Corporation of Plymouth to construct a watercourse for public objects—as bringing the water to Plymouth, and cleansing the Port. An information was filed by the Attorney General to set aside a purchase effected by the Hospital of Orphans' Aid Charity from the Corporation. The Master of the Rolls said, that the Corporation could not divest themselves of this property till all the public purposes were complied with. It is doubtful whether they could alienate any part for satisfying a debt due by them. The purchase of one-fourth of the leat or watercourse acquired only a right to such part of the water as might remain after supplying such public purposes. If the Attorney General desired it, the conveyance should be given up to be cancelled. If the defendants desired it, the hospital was not to be entitled to any water, nor to any rents, &c., till the town and haven should be supplied. It was referred to ascertain the particulars of the property in 1805, when the last purchase took place, and an account of moneys re-

(e) 4 Bligh. N. C. 381, Hall v. Swift.

ceived and paid by the Corporation in respect of such property was directed to be taken.(f)

Little need be said on the subject of prescription in this place. If the water claimed have been enjoyed from time immemorial, the right to it may be considered as very fully established.(g)

[\*149] And so, again, a claim may be made to water, by shewing a grant of it; but it should be remarked, that being an incorporeal hereditament, the grant must be by deed.

Thus, in the case of a gutter, the plaintiff declared that he was the tenant of an inn, and of an adjoining yard, and that the defendant was possessed of another neighbouring yard as tenant. The plaintiff then stated, that the defendant and his landlord had granted to A., the plaintiff's landlord, his heirs and assigns, license to make a drain at A's expense from thence into the defendant's yard, and thence into the plaintiff's yard. It was alleged, that the defendant had obstructed this drain without notice. The learned Judge at the trial, finding that this license to make the gutter was by parol, nonsuited the plaintiff, considering the right in question as an uncertain interest within the Statute of Frauds. It was moved according to leave reserved, to enter a verdict for the plaintiff, on the ground that this was a mere easement, and not an interest. But the Court held, first, that this was an interest; and, next, that assuming it to have been an easement, it could not have had a legal existence except by deed; and that the plaintiff had a mere enjoyment at will, which the defendant had determined by his act of obstruction.(h)

A verbal license, therefore, will not be sufficient, and, although acted upon, it may be revoked.(i)

But it should be added, that a parol license, not being in respect of an interest or an easement, and acted upon with expense to the party using the license, is not countermandable when duly made, because the party cannot be placed in statu que at its expiration. So that where, by

(f) 9 Beav. 87, Att. Gen. v. Corporation of Plymouth, 15 L. J., Canc. 109. S. C.

(g) The passage in Bulstrode, where it is said by Whitlock, J., that "A watercourse doth not begin by prescription, nor yet by assent, but the same doth begin ex jure nature, having taken this course naturally, and cannot be averted,"† is not inconsistent with the position in the text. The learned Judge made the observation to prove that unity of possession would not work the extinguishment of a watercourse, but it by no means follows, that because such an easement begins without prescription, it may not be so claimed by virtue of a supposed subsequent grant.

(h) 5 B. & C. 221, Hewlins v. Shippam. S. C. 7 D. & Ry. 783; and see 4 East, 107, Fentiman v. Smith.

(i) 1 Cr., M. & R. 418, Cocker v. Cowper. S. C. 5 Tyr. 103. S. P. 5 B. & Ad. 1; Mason v. Hill; and see 13 Mees. & W. 838, Wood v. Ledbetter.

† 3 Bulst. 340.

a parol license from the father of the plaintiff, the defendants had cut and lowered the banks of a river, and had thereby diverted the water flowing towards the plaintiff's mill, it was held, that the defendants, even after notice, could not be sued for continuing the weir, for the license, when countermanded, would not leave the parties as they were. The plaintiff's father had abandoned the water, which is naturally \*publici juris, and by the act of relinquishment it became again [\*150] such.(k)

Should the license be by parol and countermandable, and the grantor sell his land to a third person, the grantee must be careful not to exercise his privilege without a fresh license, for the original license is at an end. The grantee will be liable to an action otherwise at the suit of the purchaser, and he is not entitled to notice of the sale, for he is bound to know of that at his peril.(l)

As to the length of time which must elapse before a grant will be presumed, we have already intimated, that a user of twenty years would suffice in the absence of contradictory evidence.(m)

A bill was brought to quiet the plaintiff in the enjoyment of a watercourse to his house and garden, through the ground of the defendant. It appeared that this watercourse had been enjoyed for a great length of time, that the plaintiff had scoured and repaired it when occasion required and that the plaintiff's vendor had been in quiet possession. It was insisted for the defendant, that the watercourse in question had been made by a former lessee of the defendant's lands under a long lease; and that after the expiration of the lease, he had been denied permission to secure or amend the watercourse; and, therefore, the defendant said, it existed upon sufferance only, and not upon any agreement or consideration. The Lord Chancellor Somers directed an issue at law, to try whether there had been any agreement made concerning the making and continuing of this watercourse, between the respective owners of the estates of the plaintiff and defendant. Subsequently, upon a rehearing, Wright, C. S., decreed for the plaintiff, saying that a quiet enjoyment was the best evidence of right, that he would presume an agreement, and that proof ought to come on the other side, to shew a special license, or that the user was to be restrained or limited in point of time.(n) The reporter adds, that this decree was affirmed by the Lord Keeper, after another rehearing.(o)

So, again, the plaintiff had been in possession of a watercourse for upwards of sixty years, and the defendant claimed the land through which the watercourse ran, by virtue of a forfeited mortgage [\*151]

(k) 7 Bing. 682, *Liggins v. Inge*. S. P. 2 Jur. 1019, *Willis v. Harrison*.

(l) 2 Jur. 1019, *Willis v. Harrison*.

(m) See 1 Camp. 463, *Balston v. Bensted*.

(n) 2 Vern. 390, *Finch v. Resbridger*. Gilb. Ca. Eq. 3, *Lord Guernsey v. Redbridge*.

(o) 2 Vern. 291, n. 1.

for one hundred years, and had obtained a decree to foreclose. The plaintiff's title being proved, he now moved for a perpetual injunction to quiet his possession, the defendant having cut a channel through his own lands, and set up a sluice, whereby the watercourse had been diverted. The Court, in this case, decreed for the plaintiff, without sending him to try his right at law, on the ground probably of his length of possession.(p)

The effect of a grant is frequently to pass more than the things described therein would seem apparently to imply. Thus it has been said, that by the lease of a wear the soil passes, because the party cannot amend it without the soil.(q) But it is laid down by Lord Coke, that if a man grant *aquam suam*, the soil shall not pass, but the piscary within the water shall.(r)

So a conduit will pass with a house, and the owner may come upon the soil of another to amend such pipe, *i. e.*, at reasonable times, and this without special prescription or special grant.(s)

Care should be taken to ascertain whether the grantor of an easement of this kind has the power to make the deed, by which he professes to pass the privilege. In the following case, the party making the deed had neither a legal, nor an equitable estate in the property which it was proposed to grant. It was an action of covenant. The plaintiff gave license by a certain indenture, to one R., who afterwards assigned to the defendant, to continue a channel, opening-way, or passage, through the bank of a river, upon condition that R. should repair to the plaintiff's satisfaction a tumbling bay there. The object of R. was, that part of the waste or surplus water of the river, which would otherwise run through the sluices or water-gates of a neighbouring lock, should pass over the tumbling bay, through the channel head or wear belonging to the mills of R. The water was to work R.'s mills in such a manner as to run over the tumbling bay, and then pass and run again into the river through another channel, thereby also granted. There were other considerations in the deed, but it was stipulated that at all events, a certain yearly rent of 225*l.* should be paid to the plaintiff. The breach was, [\*152] nonpayment of three years' rent. \*The defendant pleaded, first, *non est factum*; and, secondly, that the estate of R. of, in, and to the demised premises, did not legally come to and vest in the defendant. The deed was given in evidence at the trial. There the plaintiff and another person were described as being the persons who had the greatest proportion or share in the profit of the river W.; and it recited, that they had for several years past permitted R. to dig and make the several channels described: and also to enjoy part of the waste, or surplus water of that river; and that R. had applied to them to renew or continue these permissions. It was objected by the defendant, that

(p) Prec. Ch. 530, *Bush v. Western*. See 2 Vern. 431, *New River Company v. Graves*.

(q) By *Doderidge, J.*, 1 Ro. Rep. 259.

(r) Mo. 682, *Browne v. Nichols*.

(r) Co. Litt. 4 (b).



there was a variance between the deed mentioned in the declaration and that produced in evidence, because it appeared that other persons than the plaintiff had a right to the profit of this river; and it therefore, by no means followed that the plaintiff had any right to make the grant, as he had assumed.

The action had been brought by the reversioner against the assignee of the grantee, and the Court agreed that such assignee might be liable to the action for a breach of covenant. For it must be assumed, that as a proprietor of the navigation, the plaintiff had a right to compel the owners of the adjoining banks to keep them closed, so as to prevent the water from escaping out of its ordinary channel. Rights against the several owners of the adjoining banks being annexed to their navigation, might, like rights of way over the lands of another, be so many incorporeal hereditaments, and the grant of an interest for a term of years in any such hereditament might operate as the grant of an interest within 32 H. VIII., so as to make the assignee of the grantee liable. But the Court said, that there must, notwithstanding, be judgment for the defendant. For the deed imported, that the plaintiff could grant the possession of the whole of the channel in such a manner, as that R. might insist upon its being continued open during the term. Did then such a right as that described in the declaration, pass to the grantee by virtue of the deed given in evidence? According to that deed, the plaintiff and another person appeared to claim, not the whole power over the river, but to a limited extent only. The grantors could not dispose of all the water, but only of so much as belonged to them. And although the words of a grant be general, yet where it appears by the deed that the grantor has a limited interest, the grant will be construed as co-extensive with and limited by the right of the grantor. But the declaration imported that the grantors had the entire right in the navigation. That was not so, and consequently there was a variance. But further, when the nature of the right is considered, it shows that these parties had not the power of creating any interest in a real hereditament, because they \*themselves were not seised of such hereditament. They had it only jointly with others. The hereditament could only be granted [\*158] for a term by all the shareholders, who at least must be tenants in common. Any one of the shareholders had a right to say, that the river should continue in its original state, and that no one should destroy its banks, or take the water from it. This deed could operate against the grantors only. It would merely bind them not to prevent R. from having the water pass through this channel; but it would not bind the other shareholders from disputing that privilege. The plaintiff had neither a legal nor an equitable estate. It appeared that he was merely entitled to a proportion of the profits of the navigation. The legal estate might have been in other persons. The equitable estate in the navigation must have been in the whole body of proprietors, and so the equitable estate in any hereditament annexed to that navigation belonged to the body of proprietors, and not to any two shareholders. The result of these observations of the court was an opinion, that both issues should have been

found for the defendant, and the rule for entering a nonsuit was made absolute.<sup>(s)</sup>

There was a demise of a mill and watercourse; except for so much water as should be sufficient for the supply of persons with whom the lessor had already contracted, or should thereafter contract to supply; provided, nevertheless, that sufficient should be left to supply the mill for twelve hours a day. An action was brought on the covenant for quiet enjoyment. This was held not to be a demise of water for twelve hours a day, and that diversions occasioned by contracts antecedent to the demise constituted no breach of the covenant.<sup>(t)</sup>

A case, the issue of which shows the necessity of a similar caution, occurred in Scotland, and came before our Parliament by appeal. The respondents had been lessees for years of lands, with the privilege of taking water from an adjoining river, for the purpose of driving machinery, &c. This privilege consisted in taking water from the Don, and digging a canal, thereby forming a conveyance of water to serve the machinery. These lessees having subsequently agreed to purchase the lands rented, entered into a contract with their lessor, by which he agreed to grant what is called a feu charter of the leased premises with the appurtenances. The right of taking water was not one of these incidents to the lands, and the vendor, when called upon to include this watercourse in the feu contract, refused to do so; and the court in Scotland decided against \*him on the ground that the feu charter [154] ought to have followed the terms of the lease. And now this judgment was reversed by the House of Lords, for the feu charter had been rightly understood by the appellant, the lessor as confined to the terms of the contract; and according to that, the privilege of taking water from the Don was not promised to the vendees, nor was it within the legal import of the contract.<sup>(u)</sup>

Another case affecting the rights of a lessee of water under the lease itself has occurred since. A pattern lease was made in 1749 granting water. Out of it was excepted the use of a watercourse in Little Moor Meadow. There were covenants to do suit and service, and to pay fines, &c. No Courts baron or customary Courts had been, however, held, as far as the evidence went, and there appeared to have been neither freeholders nor copyholders within living memory. The tenant of the premises leased erected a mill, and diverted the water from this excepted watercourse, and this diminished the water available for irrigation. In 1831 a new lease was granted under the same power which sanctioned that of 1749. And in it so much water was granted for working the mill as the tenant had been accustomed to enjoy, *together* with the use of the water in Little Moor Meadow, and there was reserved to certain

(s) 1 B. & C. 694, *The Earl of Portmore v. Bunn*.

(t) 3 Bing. N. C. 691, *Blatchford v. Mayor of Plymouth*.

(u) 1 Bligh. 42, *Paton v. Brebner and another*.

occupiers of meadows the right to cleanse the watercourse, or take water for the use of their meadows. The covenant to do suit and service was repeated, but *not* the covenant to pay fines, &c. Ejectment was brought, and it was contended that the lease in 1831 was void, on the ground of its having exceeded the power under which the old lease proceeded. It was left to the jury to say what quantity of water the mill ought to have, in order to see whether any excess of water had been granted. And the Court held this a proper direction. But it was objected, that the covenant to pay fines, &c., had been left out of the lease of 1831. The Court, however, said, that, under the circumstances, this was not a usual nor reasonable covenant, the omission of which, as the plaintiff's counsel contended, would avoid the lease. And, lastly as to the inclusion of the water of Little Moor Meadow in the new lease, the Court referred to the pattern lease, as not having reserved the *channel*, but only the water. The channel had passed, and all that was now granted was the use of certain water formerly withheld. The jury had decided, that there had been no permanent diminution in respect of water for irrigation, so as to create injury, and, therefore, the grant of 1831 was not one of excess, and the plaintiff was not entitled to succeed in the ejectment. (v)

\*Trespass was brought for breaking and entering the plaintiff's close, and digging a pit or hole there, and for opening or uncovering a sough or drain. The defendant pleaded not guilty, and that the *l. i. q.* was a piece of woody ground. He went on to say, that one J. M. was seised of another piece of woody ground adjoining, and also of land contiguous to the same, that there was a coal mine under the woody ground and land, and that one S., who was seised of the *l. i. q.*, granted to J. M. liberty to carry up a sough from the bottom or edge of the hill near a brook in the *l. i. q.* (also a parcel of woody ground belonging to S.) into the said parcel of woody ground of J. M., and also liberty for J. M. to make two little sough pits in R. S.'s woody ground near the edge of the brook, for the more easy and safe carrying up of the tail of the said sough. One of the sough pits was to be covered, and the other to be kept open for examining the sough so long as might be necessary for that purpose. Liberty was likewise given to get stones in the woody ground of S. for making the sough, and repairing the fence or wall belonging to S. The plea then stated, that the sough and sough pits were made, that the coal had not been entirely got from beneath the woody ground and the other lands, and that the defendant entered the *l. i. q.* in order to repair, open, and cleanse the sough for the uses and purposes aforesaid. The replication was, that the sough pits had been filled up with the mutual consent of both parties, and that they had not since been kept open. To this there was a general demurrer, and a joinder; for it was contended, that although the old sough pits were filled up, a right to repair the sough itself, by making new sough pits, re-

(v) 17 Law J., Q. B. 154, *Doe d. Earl of Egremont v. Williams*; S. C. 11 Q. B. 688.

maintained. The right of making the sough partly in the land of S., gave J. M. the right of entering on the grantor's soil for the purpose of repairing the thing granted. And of this opinion was the Court. There being nothing to narrow the grant, the right to repair the sough, and of doing all necessary things for that purpose, passed as an incident to the grant of the liberty of making it. Judgment was accordingly given for the defendant.(x)

[\*156] \*A sliding fender used to prevent the escape of water from a mill stream, does not necessarily become part of the freehold.(y)

The privilege of a watercourse is not confined to private individuals. It may be vested in a corporation, as in a case which will be hereafter mentioned, where there was a grant to the Corporation of Carlisle of water, for the purpose of turning the city mills.(z) So, also, inhabitants may prescribe for such an easement. The custom of keeping an ancient ferry boat was likened, upon one occasion, to the case of a gateway or watercourse, for which the inhabitants of a vill, or the parishioners of a parish, might allege a custom or usage.(a)

Indebitatus assumpsit may be maintained by a reversioner against the successor of the lessee of a watercourse for use and occupation after the death of the cestui que vie.(b)

Of course cases may be found where a watercourse is a very considerable annoyance.

As where the defendant had constructed a roof with eaves from whence the water descended in a spout upon the plaintiff's premises, and it was considered to create such an injury as a reversioner might sue for, if he could prove a damage resulting from it.(c)

The existence of watercourses, being easements, is a material ingredient in offering an estate for sale. A title not disclosing these privileges, will, probably, be defective. Certain lands were submitted to auction, and the particulars described them as building ground, and the conditions provided against errors or mistakes by a promise of compensation. The

(x) 7 East, 613, *Hodgson v. Field*. And the Court mentioned with approval the Year Book, 2 Ed. 3, 35, as cited by Holroyd, arg.

If a man grant to me to dig in his land and make a trench from such a fountain or spring to my place, so that I may put a pipe to carry my water to my place, if the pipe be afterwards stopped or broken, so that the water cannot issue out, I cannot dig the land to amend the pipe, for that was not granted to me; but if he had granted that I might dig and amend the pipe, *toties quoties*, &c., then I should do it; and the law is the same if I prescribe to have such a conduit; it behoveth me to prescribe to scour and amend it, *toties quoties*, &c., or otherwise I cannot dig the land to empty it, &c. *Quod fuit negatum* in both the cases, for it was said by the Court, *that it is incident to such a grant to scour and amend*. And 2 Ro. Ab. 567 (M), pl. 1, 2 and 3, was likewise cited.

(y) 15 Law J., Q. B. 247, *Wood v. Hewitt*. Id. 248, *Mant v. Collins*.

(z) 8 East, 487. (a) 3 Mod. 294. (b) 4 B. & C. 8, *Davis v. Morgan*.

(c) 11 Ad. & El. 40, *Tucker v. Newman*.

sale took place, but it appeared that liberty had been given by various deeds for persons to take water from these lands, and to make a covered goit or watercourse thereon; and other easements were likewise granted under the same conveyances. Upon this, an objection was raised to the title, because no notice of the easement had been disclosed in the particular and conditions. But it was answered, that the purchaser had lived in the neighbourhood, that he knew the property, and that watercourses existed thereon; and that this did not constitute a material defect in the title. The Court, however, held, that the purchaser should not be compelled to accept the title. The grant of a watercourse \*alone unnoticed, would be sufficient to raise a serious doubt as to the validity of the purchase. The objection, also, was one of [\*157] substance, and no compensation could be made available, although the lands affected by the easements were only four acres and a half out of thirty, especially as the plaintiffs admitted that they could not obtain a release from the easements. And, although the purchaser might have known of the water courses, it did not follow that he was acquainted with them as easements. The bill was dismissed with costs.(d)

## CHAPTER VIII.

[\*158]

### OF THE USE OF RIGHTS CONNECTED WITH WATER.

THE present Chapter is devoted to the consideration of the manner by which the rights mentioned in the foregoing pages ought to be exercised.

First, as the privileges which are enjoyed in the sea and public rivers, they must, necessarily, be used in conformity with the established customs of nations, subject also in this country to the provisions of the Legislature, and in some instances to the prerogative of the Crown. Thus, the obligation of paying certain tolls may exist, under certain circumstances, highly tending to the advantage of the public; and although the waters of the sea and navigable streams are, *prima facie*, free from any such burden, the rule is liable to qualification, as we shall shew when we come to speak on the subject of toll. The same observation will apply to the port and harbour duties, the payment of which, although it may be said to interfere with the natural liberty of the subject, is yet warranted by the vast benefits which have resulted from the spirit of private adventurers in forming those conveniences for shipping. So, again, the common right of piscary would naturally be supposed to include all fish of every description, but here the prerogative of the Crown interposes itself, reserving sturgeons and whales, which have thence been designated royal fish.

(d) 1 De G. & Sm. 609, Shackleton and others v. Sutcliff.

We shall find, also, that the user of public fisheries is governed by many wholesome regulations, such, for example, as relates to the size of nets; and in a former Chapter we have mentioned, that during certain seasons of the year, some kinds of fish are protected from the hands of the fisherman.

We shall also speak of the user of mills, and, lastly, of watercourses, in which latter case, the principle, that every man must so use his own as not to create injury to others, will be found fully recognised.

[\*159] \*The user of fisheries may be treated of under two heads, namely, the user, 1st, of public, and, 2ndly, of private fisheries. With regard to the former, we have already pointed out in the fifth Chapter the quality of the fish which are to be taken, and also the season during which the right is permitted. It is the particular method of catching fish, as by nets or otherwise, with which we have now to do; and it must be familiar to the recollection of every reader, that the size and quality of the net or other engine, used for the purpose of taking fish, has been made the subject of legislative enactments. Thus, an act passed in the reign of James I., after reciting, that those which use draw nets, nets with canvas, or engines in the midst of them, do, every day they fish, destroy the brood of all sorts of sea fish, ordained, that every person who should fish with any draw net or drag net under three inches mesh, *viz.*, one inch and a half from knot to knot, in any haven, harbour, creek, or within five miles of the mouth of any haven, harbour, or creek of the sea, except for the talking of smoulds in Norfolk only, or with any net with canvas, or other engine or device, whereby the spawn, fry, or brood of sea fish may be destroyed, shall forfeit such net, and also, for every offence, 10*l.*, half to the poor of the city, parish, &c., where the offence shall be committed, and half to the person who shall sue for the same, the said forfeitures to be levied to the uses aforesaid, by the mayor, bailiff, or other head officer of every city. And by the warrant of one or more justices, the constables and churchwardens of every market town, parish, &c., where the offence shall be done, shall levy the penalty by distress and sale, rendering the overplus, if any, to the party whose goods shall be distrained.<sup>(a)</sup> Next follows a proviso, however, that the act shall not extend to punish any person for using a net of a less mesh than is appointed by the act, for taking of herrings, pilchards, sprats, or lavidnian.<sup>(b)</sup> And there is another proviso, that the act shall not extend to the Isle of Anglesey.<sup>(c)</sup>

And by 1 Geo. 1, st. 2, c. 18, s. 4, after reciting, that the breed and fry of sea fish have been greatly prejudiced and destroyed by the using of nets of too small size or mesh, and by other illegal and unwarrantable practices, it is declared, that if any person shall use at sea, upon the coast of England, any traul net, drag net, or set net whatever, for the catching of any kind of fish (except herrings, pilchards, sprats, or lavidnian,) having the mesh or moke of less than three inches and a half as least from

(a) 3 Jac. 1, c. 12, ss. 1 and 2.

(b) *Id.* s. 3.

(c) *Id.* s. 4.

knot to knot, or having any false or double bottom, cod or \*pouch, or shall put any net, though of legal size or mesh, upon or behind the others, in order to catch and destroy the small fish which would have passed through any single net of three inches and a half mesh, he shall forfeit the nets, together with 20*l.* for every offence, to be levied by distress and sale, &c., and in default of payment, or of sufficient distress, shall be imprisoned for twelve months. The party, however, is to be duly convicted on oath upon his appearance, or on default made after a due summons. [\*160]

Regulations concerning the size of nets to be used in public rivers are prescribed by stat. 1 Eliz. They were made for the preservation of young fish; and it is accordingly declared, that no person shall fish with any manner of net, trammel, kepe, wore, hivie, cale, or any other engine, &c., in any river or streams, salt and fresh, within the realm, but only with net or trammel, whereof every mesh or mask shall be two inches and a half broad, angling excepted. (d) There is an exception of smelts, &c., as we have mentioned in a former page, (e) provided that no other fish be destroyed by the said nets or engines. (f) It is also specially ordained with respect to the Rivers Severn, Dee, Wye, Teame, Were, Tees, Ribble, Mersey, Dun, Air, Ouse, Swaile, Calder, Wharf, Eure, Derwent and Trent, that no one shall fish there for salmon with any other net than such as is allowed by the act of 1 Eliz.; and by another act passed in the 80th year of the reign of King Charles the Second, for the preservation of fishing in the River Severn. (g)

Then, as to the penalties incurred under these acts, that of Elizabeth imposes a forfeiture of twenty shillings for every offence, together with the fish and nets, and this a general provision which extends to all rivers. The act of Geo. I. gives a forfeiture of 5*l.* (h) together with the fish and nets; and the justices before whom the conviction takes place shall order the nets, &c., to be cut and destroyed in his presence. This last statute, however, comprises those rivers only which are named in it.

The Thames has been made the subject of a separate enactment in this respect; for by the act for more effectually preserving and improving the spawn and fry of fish in that river, and in the Medway, the Court of the Mayor and Aldermen of London are empowered to prescribe the size and kind of nets and engines to be used in fishing those waters, (i) and a penalty not exceeding 5*l.* for each offence is awarded against such as disobey the rules laid down by the Court. (k) [\*161]

(d) 1 El. c. 17, s. 3. (e) *Ante*, p. 85. (f) 1 Eliz. c. 17, s. 4.  
 (g) 1 G. 1, st. 2, c. 18, s. 14. (h) *Ante*, p. 104. (i) 30 G. 2, c. 21, s. 1.  
 (k) 30 G. 2, c. 21, s. 1. And see 13 & 14 Vict. c. 83, An act to amend the law relating to Engines used in the rivers and on the sea coasts of Ireland for the taking of Fish.

It has been adjudged, that the water bailiff (1) of the River Thames cannot justify, under 1 Eliz., the seizing of nets in a private fishery. Trespass was brought for entering the plaintiff's close called the Thames, breaking his bucks there placed for catching fish, &c. The defendants pleaded, that the close in question lay between Staines Bridge and the head of the river, and that the conservancy of that part of the river was in the Crown, and that the office of water bailiff was in the gift of the Crown. They then set forth the statute of Elizabeth against using unlawful nets, and shewed a grant from the Crown to two of them, of the office of water bailiff between Staines Bridge and the head of the river; and they then justified, because the bucks were unlawful engines. The plaintiff replied, that the offence ought to have been inquired into at a Court of conservancy, but that no proceeding had been taken against him in such a Court. To this replication there was a general demurrer; and it was admitted to be bad, being a suggestion of a matter of law. But the question then was, whether the plea could be supported, because the mode of proceeding pointed out by the statute was by presentment and conviction. And the Court were quite clear that the act of the water bailiff was illegal. Here was an offence created by an act of Parliament; and if, said Lord Mansfield, you take advantage of the act, you must pursue the method prescribed by it.(m) The Court laid great stress upon the circumstance of taking these nets in the plaintiff's own fishery; but it should seem, that if the place had been a public fishery, the same necessity would have existed for a conviction prior to the seizure, there being no power to seize conceded by the statute.

However, where the offence happens within the jurisdiction of the city Court of Conservancy, the water bailiff is invested with an especial authority to take unlawful nets. Thus, by the 5th section of 30 G. 2, c. 21, it is declared, for that the better preservation of the fishery of the Thames and Medway, within the jurisdiction of the city, the water bailiff and his assistants, appointed by warrant under the hand and seal of [\*162] the mayor, \*and all other persons specially authorized in like manner by the mayor, may at any time enter into any boat, vessel, or craft, of any fisherman, or dredgeman, or other person taking fish, or endeavouring to take fish, upon the Thames and Medway. The water bailiff, &c., is further empowered to search for, take, and seize all spawn, fry, brood of fish, spat of oysters, and unsizeable, or unwholesome, or unseasonable fish, and also, all unlawful nets, engines, and instruments for taking or destroying fish, as shall then be in any such boat, &c., or upon the river, &c. They may, moreover, take and seize, on the shores adjoining, all such spawn, &c., there found, and shall, with all convenient speed, after such seizure, as aforesaid, cause the same

(1) Water bailiff. "The office of a water baillie, or scrutator, is a bare ministerial officer, which the King doth or may appoint in those rivers or places that are in his franchise or interest. And his business was to look to the King's rights as his wrecks, his flotsam, jetsam, water stays, royal fishes."—Hale de Jure Maris, p. 23.

(m) 3 Burr. 1768, Bulbrook v. Goodere and others. S. C. 1 Sir Wm. Bl. 569.



to be brought, i. e. fish, nets, &c., before the lord mayor, or recorder, or an alderman, whether the seizure have been made within or without the limits of the city. But further, should the seizure be made without that limit, the illegal commodities, nets, &c., may be taken before a justice for the county, provided it be within the conservancy jurisdiction. The things seized shall then be examined; and if, either on view, or upon proof on oath, (which oath the said magistrates are empowered to administer,) the fish, nets, &c., shall appear to have been unlawfully taken or used, contrary to the rules, orders, and ordinances of the Court of the mayor and aldermen, the said mayor, &c., or justice, within their respective jurisdictions, shall cause the nets, fish, &c., to be burnt or destroyed.<sup>(a)</sup> The following section provides, that whoever shall obstruct the water bailiff, &c., in the execution of his office under the act, or of any warrants issued by the mayor, or shall rescue any person apprehended by virtue or in pursuance of the act, shall forfeit, on conviction, the sum of 10*l*., the matter being tried before the said mayor, &c., or justice, upon the oath of at least one credible witness. The justice may be of the county where the offence was committed, or of that (if different) where the party was apprehended.<sup>(o)</sup> It should be observed, that the statute is particular in describing the offences said to be committed, and the authorities given are to be exercised, within the *jurisdiction of the mayor, &c. of London*.

We collect, also, from the foregoing provisions, and also from the case cited above, that those parts of the sea, or public rivers, which belong to a subject, are within the scope of the statutes; for it will be remembered that the water bailiff mentioned in *Burrow* failed, because he had not pursued the proper course prescribed by the statute of Elizabeth. And it may be added, that he would probably, have succeeded if he had brought the \*matter before the Court of conservancy for the [\*168] jurisdiction where the offence happened.

There are other privileges connected with the subject of user, which it is desirable to notice in this place. Such for example, is the custom of going on the adjoining land for the purpose of fishing; or, again, for the landing of nets. This easement is supported by, and owes its existence to custom or license; for we shall find, that whatever might have been the ancient opinion, it is now well established, that a man cannot justify, of common right, an entry upon the lands of another, for the advantage of a more convenient fishing. In early times, however, a different idea was entertained. Trespass was brought for digging the plaintiff's ground. The defendant pleaded, that there were four acres adjoining to the sea, and that all the men of Kent had been used, from time immemorial, to dig the neighbouring ground when they fished, for the purpose of pitching stakes, in order to dry their nets. In this case, one Judge<sup>(p)</sup> laid it down broadly, that such as were fishers in the sea might justify their going on the land adjoining to the sea, because such fishery

(a) 30 G. 2, c. 21, s. 5.

(o) *Id.* s. 6, and see s. 10.

(p) *Danby*.

would be for the commonwealth, and the sustenance of all the realm ; and this, he said, was the common law, which was agreed.(g) There was a doubt amongst the other Judges, whether a custom to the effect mentioned could be sustained. Littleton, J., observed, that if a man might dig in one place, so also might he in another ; and consequently, where a meadow adjoined to the sea, the whole of the grass might be destroyed, which would not be reasonable.(r) But by Choke, C. J., if I have land adjoining to the sea, so that the sea ebbs and flows upon my land, when it flows, every one may fish in the water which has flowed on my land ; for then it is parcel of the sea, and in the sea every one may fish of common right, &c. ; and when the sea is ebbed, then, in this land, which was flowed before, peradventure he may justify his digging &c., for this land is of no great profit to me, &c.(s) And Fairfax seemed to think that a custom could not be good which went to destroy the inheritance, although it were true that the fishery might be for the general good ; for there must be some consideration, or quid pro quo ; and prima facie, there would not appear to be any consideration in favour of the owner of the soil for this easement of drying nets.(t) However, Lord Hale [\*164] treats this as a particular custom, and refers in his book *De Portubus Maris*,(u) to the custom of Kent, for fishermen to dry their nets upon the land, though it be the soil of private men. And again he cites Morgan's case in another page, who, although fined for taking toll upon his lands, without a lawful title, either by charter or prescription, might have been justified in bringing trespass for amends in respect of unloading goods upon his soil.(v)

Then, in confirmation of the general doctrine, came the well-known case of *Ball v. Herbert*,(w) by which it was decided, that the public have no common law right to tow on the banks of ancient navigable rivers, but that such a privilege must owe its legal existence either to custom or the authority of Parliament. After this, it could hardly be said that a general right could exist in the King's subjects to come upon the land of another for the purpose of fishing, or landing, or drying nets ; for, reasoning by analogy, the trespass committed on the property of another would be the same on both occasions and the exercise of both rights is of public utility. It therefore becomes necessary to refer the undisputed user of such a privilege to an especial custom ; and such a custom, when reasonably exercised, may probably be deemed sufficient in law. Thus, by Holroyd, J., in the great case of bathing on the sea shore, "It was not by the common law, nor is it by statute, trespass to come with, or land, or ship customable goods in creeks or havens, or other places out of the ports, unless in cases of danger or necessity ; nor fish, or land other goods not customable, where the shore on the land

(g) 8 E. 4, 19, pl. 30. Bro. Customs, pl. 46, cites S. C. Fitz. Ab. Barr. pl. 93.

(r) Ibid.

(s) Ibid.

(t) Ibid.

(u) P. 86 ; and see 1 Bulst. 116.

(v) Id. p. 51.

(w) 3 T. R. 253. See 1 Ld. Raym. 725, *Young v. —*, 2 B. & P. 496, *Simpson v. Scales*. 3 B. & A. 193, *R. v. Tippet*. 1 Burr. 292, *Pierce v. Lord Falconberg*.

adjoining is private property, unless upon the person's own soil, or with the leave of the owner thereof."<sup>(x)</sup> And, again the same Judge observed with regard to the case above cited from the Year Book, that it proceeded entirely upon a particular custom, and that the doctrine laid down by Choke, C. J., might be true where there was such a custom. Such a custom, added the learned Judge, might if confined to the sea, shore, be good; but if founded on the common law, is inconsistent with many passages in Lord Hale.<sup>(y)</sup> And it should seem that there would be no objection to such a custom on the banks of public rivers, provided it were exercised in a reasonable manner, and with as little injury as might be to the owner of the soil.

\*There is an ancient statute, which enables persons within the counties of Somerset, Devon, and Cornwall, to watch on hills, [\*165] during the times of fishing, for the purpose of giving notice of the approach of herring, pilchards, &c., without committing a trespass. Suits having been preferred against such persons, to their great loss and expense, it is declared, that for the maintenance of the trade of fishing in these counties, all such watchmen, balkers, huors, eondors, directors, and guidors, and all such fishermen as shall necessarily attend the seans or nets, at the time of fishing for herrings, pilchards, and other sean fish, may enter upon any lands, &c. adjoining such fishing places, and fit and convenient to watch in, &c., or draw the fish on shore and may then watch, &c., and guide the fishermen, and draw the fish on shore.<sup>(z)</sup> And upon the bringing of an action of trespass for so doing, it shall be lawful for the defendant to plead not guilty; upon which the whole matter shall be given in evidence. And upon a verdict for the defendant, or nonsuit of the plaintiff after appearance, the defendant shall recover his damages, with costs, to be assessed either by the jury who shall try the issue; or by writ to inquire of the damages as the case shall require; and the defendant may sue out such execution for the costs and a damages as defendant in replevin may do.<sup>(a)</sup>

A few remarks will be sufficient to illustrate the mode of suing private fisheries.

The ordinary maxim, that the privilege must be so used as not to injure others, is of course applicable: and it may be added, that as the public right of navigation is of a higher character than a fishery, the latter must not be exercised in derogation of commerce. The right of the individual is, in effect, subject to the right of the public to use the river for all the purposes of navigation. The plaintiff sued in trespass for disturbing his fishery in the Tweed. It appeared at the trial, that the defendant's ship was moored against a rock on the bank of the river; that she there delivered her cargo; and that the plaintiff could not take so many

(z) 5 B. & A. 295, in *Blundell v. Catterall*.

(y) 5 Id. 297. See *Gray v. Bond*, 2 B. & B. 667, and post, in this Chapter.

(z) 1 Jac. 1, c. 23, s. 3.

(a) Id. s. 4.

fish as he would have done had it not been for the situation of the ship. There were mooring rings upon the rock ; and it was found, that the ship frequently lay there when waiting for a wind. The learned Judge, Mr. Baron Wood, took the distinction very clearly between the malicious or obstinate exercise of a public right, to the detriment of private property, and the due uses of such a public right, although an individual privilege might thereby be \*made subservient to it. If the general right be [\*166] abused, so as to work an injury, the offender becomes liable to an action. As where a man obstinately refused to remove his ship from lying opposite a wharf, although his moving a little one way or the other would not have made any difference ; here he abused his right, and the plaintiff recovered. But in the present case, the defendant had a right to moor, and remain where his ship lay, as long as convenience required. The learned Judge added, that it would be very mischievous if the owner of a fishery could prescribe to the public how and where they are to moor in a navigable river.(b)

The nets which may be lawfully used in a private fishery must be such as will not injure the rights of other persons.

Upon most occasions, a man may use any nets, according to his pleasure, in his several fishery, which he appropriates exclusively to himself ; but if he allow another to participate in his property, he cannot be justified in taking the fish with such engines as would leave none for his grantee ; because the principle is *sic utere tuo ut alienum lœdas*. Then, with respect to a common of fishery, the user of nets must be regulated according to the custom of the manor. In some manors, the net is employed at certain seasons, for the purpose of taking fish ; and it would be clearly incompetent for some commoners to drag with instruments of a greater depth than customary, whilst their neighbours were content with the usual manner of obtaining the commonable profit.

With respect to the quantity of fish which may be taken, it is clear, that in a several fishery—that is, where the proprietor has an exclusive right—the number must be unrestricted. So it is, of course, where the same person is owner of the fishery and also of the soil, exclusively of any other. And so, again, the owner of a several or territorial fishery, may take an unrestrained profit, although another have a co-extensive right with himself. But the lord of the manor, it should seem, may not use the water where his tenants have a common of piscary, to so large an extent as to deprive them of their privilege, because such an act would be in derogation of his own original grant. And as a general principle, the proprietor of a fishery cannot so use it as to injure a similar right belonging to another person. Thus, the state or condition of a fishery low down a stream, cannot be so altered as to obstruct the passage of fish [\*167] into the upper fishery, especially if it be done in such a \*manner as may be prejudicial to the fair exercise of the right of catching

(b) 1 Campb. 517, n., Anonymous, at Durham Assizes, 108, cor. Wood, B.

fish in the lower fishery.(c) For such an injury, we shall see hereafter that an action may be maintained.

The user of a common of fishery differs, in some measure, from those rights which have been mentioned above. It is most consistent with the origin of the grant, that a commoner should take a reasonable supply only; because it is understood, that such a common enures to the sustenance of his family, and that its produce may not be appropriated to any other purpose. It must also be used at proper seasons of the year; and these times, together with the method of fishing, vary according to the usages of different manors.

In some places, commoners are accustomed to sell the fish which they have caught in their common of fishery. If this practice have obtained in any manor, from time immemorial, and it be prescriptively claimed for a certain quantity of fish, as, for five baskets, &c., perhaps the Courts would uphold it; but where the right appertains to a tenant, it may well be doubted whether any other uses can be sanctioned than for the consumption of the commoner's family.(d) For as each species of common was primarily conceded for some beneficial end, so the particular benefit of a common of fishing is said to have been for the sustenance of the tenant's household.(e)

We cannot conclude these observations on the user of private fisheries, without adverting to the important fact, that there is not of necessity any right to land on the neighbouring shores, after the taking of fish. This difficulty has been known to arise in cases where the owner of the fishery has had no property in the adjacent soil, and where the exercise of his right has, consequently, been carried on in boats.

In confirmation of this an old dictum may be cited, in which it was said, that if one have a piscary in any water, he has no power to land without the assent of the owners of the freehold.(f) This was laid down in a case where the Court decided, that in every ferry the land on both sides ought to belong to the owners of the ferry, who otherwise could not land on the other side.(g) This decision, however, was overruled in a recent case, where the Court held, that the owner had a right to embark and disembark passengers, as incident to the ferry, without having any property in the soil, and that it would be sufficient for [168] him to use the land for all the purposes of his ferry.(h) It will, however be instantly seen, that the right of fishery may be carried on by boats, as we have said above, without interfering with the adjacent shore; and thus a broad distinction is observable between the fishery and the ferry. As

(c) 3 Ridgw. 324.

(d) See "Woolrych of Commons," 1850, p. 91.

(e) 2 Comm. 35.

(f) Savil. 11, in the case of Ipswich Inhabitants v. Browne.

(g) S. C. as the above.

(h) 6 B. & C. 783, Peter v. Kendal.

far, therefore, as regards the former, the law, as found in Savil, may still be considered as correct.

So it is said in Hobart: "If I give you the fish in my waters, you may fish with nets, but you may not cut the banks to lay the water dry." (i)

Nevertheless, evidence of enjoyment of such a landing place for twenty years and upwards, will be sufficient to warrant the Judge in directing a jury to presume a grant; and it was so held upon a late occasion.

An action upon the case was brought for disturbing the plaintiffs in the enjoyment of their right to draw nets to land on the banks of the Derwent, wherein they had a fishery. They recovered a verdict, subject to the opinion of the Court upon a case. It appeared that the lord of the manor had, from time immemorial, been seised of a fishery in the river, extending throughout the length of the manor, and appurtenant thereto. One S. was seised of the manor in 1774, and he conveyed to R. and J. D. a close, upon which a certain landing place, or felling, called the Crab Tree Felling, was situated. The plaintiffs were owners, for a term of years, of the manor and fishery, and they were in possession at the time of the grievance complained of. At the trial, it also appeared, that the owners of this fishery, and their lessees, had, for upwards of twenty years, drawn their nets upon the bank of the river, on the side where the close was situate, (concerning which the dispute arose), for the purpose of taking the fish out of their nets, and that they had occasionally dressed the landing places, by sloping the fore shore, and levelling the ground with a spade. The landing place in question was situate on the close, which has above been said to have been conveyed to R. and J. D. One Mr. P. claimed under these persons, and his servants, the defendants, by his direction, placed stakes upon the Crab Tree Felling, so as to prevent the plaintiffs from pulling their nets to land, and using the felling so conveniently as before. It had been urged for the defendants, that as the conveyance had been made to R. and J. D. without any exception [\*169] or reservation of the right of landing nets, the right had become extinguished. But the learned Judge left it to the jury to presume a grant of the right, from the evidence of enjoyment, by some former owner of the close, since the conveyance above mentioned, and the jury found for the plaintiffs. The Court held, that the question had been properly submitted to the jury. Mere lapse of time, certainly, would not have been sufficient to have raised such a presumption. But here, the inference was, that the owner must have had knowledge of this user, because the landings were made publicly, when he was in possession of the property, and for the purpose of aiding the enjoyment of the plaintiff's right, the soil had been levelled. These accompanying facts were, therefore, sufficient to warrant the inference which the jury had drawn, and judgment was given for the plaintiffs. (k)

(i) Hob. 234. 1 Saund. 323 (b).

(k) 2 B. & B. 667, Gray and another v. Bond and another.

It is impossible to enter on the subject of the due user of the mills without perceiving that the mode of managing the water, forms no inconsiderable share of the inquiry. We shall, therefore, reserve this point until a subsequent part of the Chapter, where the use of watercourses will be fully discussed. Other matters, however, connected with the subject, still remain, and these shall be briefly noticed in their order.

By 4 Ann. c. 21, an act for the increase and better preservation of salmon and other fish in the rivers within Hampshire and Wiltshire, it is declared, by sect. 5, That all owners and occupiers of corn, fulling, and paper mills, and other mills, upon any of the waters or rivers in the said counties, shall constantly keep open one scuttle or small hatch of a foot square, in the waste hatch or watercourse, in the direct stream, wherein no water wheel stands, sufficient for the salmon to pass and repass freely up and down the said rivers in the said counties, from the 11th day of November to the 31st day of May in every year; during which season the old salmon and the young fry of the preceding year retire to the sea, and the breeding salmon come from the sea to spawn. Such owners, &c., shall not make use of any nets, pots, racks, hawks, gins, or other devices whatsoever, to be placed in the said scuttle or small hatch of a foot square in the said waste hatch, in or about the said mills respectively, during the said term, to kill or destroy, or take any salmon or salmon kind, upon the like pains, penalties, forfeitures, and imprisonments as aforesaid; (l) and in case they shall lay any pots or nets to catch eels after the 1st day of January to the 10th day of March in every year, (which [170] they may do,) they shall not set racks before them, to keep out of the said pots or nets the old salmon or kippers, which during that season are out of kind, and returning to the sea; and after the 10th day of March to the 31st day of May in every year, they shall lay no pot, net, or engine, but what shall be wide enough to let the fry of salmon pass through to the sea, or shall take, keep, or offer to sale, any of the young fry, that, during the seasons aforesaid, are returning from the said rivers to the sea, upon the pains, penalties, forfeitures, and imprisonments, as aforesaid. (m)

Another material point relating to the subject of user of mills, is the taking of the proper toll.

There is an ancient ordinance which directs, that the toll of a mill shall be taken according to the custom of the land, and also according to the strength of the watercourse, either to the twentieth or the four-and-twentieth corn. (n)

(l) That is to say, for the first offence, a sum to be ascertained by the justices before whom the conviction shall be made, not under 20s., nor more than 5l.

For the second, not under 40s., nor more than 10l. As the trespass or offence may increase, double the penalty, to be ascertained as aforesaid.

One-half is to go to the informer, and one-half to the poor of the parish where the offence has been committed; and if the penalty be not paid on demand, the offender shall be sent to the House of Correction for three months. Sec. 2 of the same statute.

(m) 4 Ann. c. 21, s. 5.

(n) Dalt. c. 112, p. 253. Burn's Justice, ed. 1820, lib. p. 497.

And the Court upon one occasion refused to grant an indictment upon motion against a miller for extortion, by taking too great a toll.(o)

If, in contravention of the custom, the miller take more than it warrants, he is clearly punishable for extortion. And an offence of this sort was hinted at upon the trial of Burdett, farmer of Newgate Market, for extortion;(p) and it was then said, that a miller, who took more than was due to him, was punishable in every feet. And Holt, C. J., observed, that such an act on the part of the miller would be perfect extortion, where the custom has ascertained the toll.(q)

However, in the case of new mills, the public must comply \*with [\*171] the demands of the proprietor, if they have ground corn at his mill; for then the miller is not restrained, and he cannot be indicted for extortion, by reason of the voluntary agreement of the parties.(r)

It is declared, nevertheless, by 36 Geo. 3, c. 85, s. 5, that no miller, or other person keeping a mill, shall demand or take any part of the corn brought to be ground, or the produce thereof when ground, by way of toll, but in lieu thereof and shall be entitled to demand payment in money; and if he shall demand or take any part such corn, or the produce thereof when ground, by way of toll for payment, he shall forfeit a sum not exceeding 5*l*. There is a proviso, that where any person has brought, or caused to be brought, any corn to be ground, shall not have money to pay for grinding the same, the miller, or other person as aforesaid, may, with the consent of the person bringing the corn, take such part of the produce of the corn as will be equal to the money price expressed in the table of prices for grinding such corn.(s) Another proviso declares, that the clause shall not extend to those ancient mills, commonly called Soke Mills, or such other ancient mills where the right and obligation of the possessors or the same to grind corn for particular persons, or within particular districts, and to take a fixed and certain toll for grinding, have been established by ancient custom, and the law of the land; but that such mills shall continue to take toll in the same quantity, and in the same manner as they have been used and accustomed to do under the aforesaid authority.(t) The next or sixth section speaks of the table of prices above alluded to. It directs, that every miller or other person who shall grind for hire or toll, shall cause to be put up, in some conspicuous place in his mill, and renew when necessary, in fair and legible characters, a table of the prices in money, or of the amount of toll or multure, for which the several operations of his mill are to be performed respectively; and every miller, or other person as aforesaid, who shall omit to set up and keep fair and legible

(o) 5 Mod. 13, Rex v. Wadsworth.

(p) 1 Ld. Raym. 148, Rex. v. Burdett.

(q) Id. 149.

(r) 1 Ld. Raym. 149.

(s) This table is prescribed by the next section.

(t) The corn taken for toll is to be deducted before the corn is put into the mill, by s. 4. And nothing in this act shall extend to any mill kept for the private use of the proprietor or occupier only. Sect. 7.



such a table, shall be liable to forfeit and pay any sum not exceeding 20s. for every such offence.

The conduct of a miller in changing corn cannot be too severely reprehended, although it may not always be the subject of an indictment. Yet it will appear from the following authorities, that if the miller be owner of a soke mill, or a mill to which the neighbouring tenants or inhabitants are bound to \*resort for the purpose of having their flour ground, he may not be punishable for a fraud of this [\*172] sort. For thus, by abusing the confidence of his situation, he would make it a colour for practising a fraud.(u)

Nevertheless, it was holden upon one occasion, in an old case cited by Hawkins, that "changing corn by a miller, and returning bad corn instead of it, is punishable by indictment; for being in the way of trade, it is deemed an offence against the public."(v) But it may be well doubted whether this decision (unless it could be understood as applying to an ancient mill,) has not been overruled by late authorities, upon the ground that an indictment will not lie for an imposition which a man's own prudence ought to guard him against; but that he is left to his own remedy. Upon one occasion the defendant, who kept a common grist mill, was indicted for detaining forty-two pounds weight of wheat out of three bushels, which were sent to be ground, and judgment was given in his favour upon demurrer, the Court considering it as a matter of a private nature, for which an action would lie.(w) This was, to be sure, an indictment for *detaining* corn; but the point came in question, a few years since, upon error brought to reverse a judgment of fine and imprisonment, given by the justices of Kent at their quarter sessions. The indictment, upon which the miller was found guilty, charged him with receiving two parcels of barley of four bushels each, to be ground at his mill, and that he delivered three bushels and forty-six pounds of oatmeal and barley meal mixed, of a description different from the produce of the four bushels which he had received. After hearing counsel on both sides, the Court were of opinion that the judgment should be reversed, both on account of some technical errors which had been alleged, and also of the objection which we have above alluded to, namely, because it respected a matter transacted in the course of trade, where no tokens were exhibited, by which the party acquired a greater degree of credit. It was no more than the case of a common tradesman, who is guilty of a fraud in a matter of trade or dealing.(x)

By 36 Geo. 3, c. 85, s. 3, every miller, or other person keeping a mill for grinding corn, shall, after grinding any corn, deliver to the party bringing the corn, on request, the whole produce of such corn in weight, allowing for the diminution in weight caused by the waste in grinding,

(u) See the observations of Lord Ellenborough, 4 M. & S. 220.

(v) 1 Sess. Ca. 217, Rex v. Wood.

(w) 2 Str. 793, Rex v. Channel.

(x) 4 M. & S. 214, Rex. v. Haynes.

[\*178] and by taking toll, in \*cases where toll is allowed to be taken of corn.(y) Further, if such corn shall be dressed into flour, then the whole produce or weight must be delivered, allowing for the diminution in grinding, dressing and taking toll. Then, if such corn, on being weighed after grinding, shall appear to weigh less than such full weight, after allowing for the aforesaid diminution, the miller shall forfeit and pay one shilling for every bushel of corn deficient in weight, and also treble the value of the deficiency,

This same statute ordains, that balances and weights shall be kept in mills, that is to say, a true balance, with proper weights according to the standard of the Exchequer. Persons are appointed to examine the weights, and a penalty of twenty shillings is awarded against every miller who is found without them. Every miller, or other person, obstructing the examination, is subjected to a similar forfeiture.(z) The next section enacts, that every person who brings corn to the mill, may require the miller, or other person keeping the mill, to weigh the corn in his presence, before the grinding, and to weigh the produce after the grinding. The penalty for disobedience is forty shillings.(a)

By sect. 8, these penalties are recoverable before any justice of the peace where the offence has been committed, upon conviction, or confession, or the oath of one witness. They may be levied by distress; and for want of sufficient, the offender may be committed for one month. Half these forfeitures is to go to the informer, and half to the poor, the overplus being returned, if any, after deducting the costs of the conviction, distress, and sale. But an appeal is allowed to the next sessions upon giving security to the amount of the penalty, and the sessions may award costs according to their discretion.(b) No such judgment or conviction can be removed by certiorari,(c) and any information must be laid within nine days after the commission of the offence.(d)

The Legislature has, moreover, visited the adulteration of meal or flour with severe penalties. For it is enacted, that if at any time information shall be given, on oath, to any justice, that there is reasonable cause to suspect any miller, who grinds any grain for toll or reward, or any person who dresses, bolts, or in any wise manufactures meal or flour for sale, [\*174] or any maker of \*bread for sale, within the limits of the justice's jurisdiction, of mixing up with, or putting into any meal or flour ground or manufactured for sale, any mixture, ingredient, or thing whatsoever, not the genuine produce of the grain such as meal or flour shall import and ought to be, or whereby the purity of any meal or flour, in the possession of any such miller, mealman, or baker, is or shall be in any wise adulterated, then the justice, or any peace officer authorized by warrant under the hand and seal of any justice within the limits of his jurisdiction, which warrant the justice is empowered by this statute to grant, may enter any house, mill, shop, bakehouse, stall, bolting-house,

(y) As is the case of *Soke Mills*, by s. 5, ante, p. 171.

(z) Sect. 1.

(a) Sect. 2.

(b) Sect. 3.

(c) Ibid.

(d) Sect. 9.

pastry, warehouse, or outhouse of, or belonging to any such mealman or baker, at all seasonable times in the day time, in order to search and examine whither any mixture, ingredient, or thing, not the genuine produce of the grain such meal or flour shall import and ought to be, shall have been mixed up with, or put into any meal or flour in the possession of any such miller, mealman, or baker, either in the grinding of any grain at the mill, or in the dressing, bolting, or manufacturing thereof, or whereby the purity of any meal or flour is or shall in any wise be adulterated. Upon this search, if it be ascertained that an offence against the act has been committed, any justice or peace officer as aforesaid, may seize any adulterated meal or flour, together with all mixtures and ingredients found and deemed to have been used, or intended to be used, in or for the adulteration. If the adulterated meal, &c., be seized by an officer, he shall with all convenient speed after the seizure carry it to a magistrate within the limits of whose jurisdiction the same shall have been seized, and if the justice shall adjudge that any mixture or ingredients, not the genuine produce of the grain any such meal or flour which shall have been so seized shall import and ought to be, shall have been put into any such meal or flour, or that the purity of any such meal or flour so seized was adulterated by any mixture or ingredient put therein, the justice is then required to dispose of the same as he may think proper. And there is the same provision in case the magistrate himself should seize the adulterated commodity, or the mixture, &c.(e)

The punishment of the miller, &c., follows next. On being convicted of any offence mentioned in the last section, by confession, or on oath of a creditable witness, before a magistrate within whose jurisdiction the offence has been committed, the miller, &c., shall forfeit and pay a sum not exceeding 10*l.*, nor less than 40*s.*, at the discretion of the magistrate; unless the party charged make it appear to the satisfaction of the magistrate who has seized the mixture or ingredients, or before whom the \*same may be brought, that such mixture or ingredients were [\*175] not brought or lodged where they were found, with any design or intent to have been put into any meal or flour, or to have adulterated therewith the purity of any meal or flour, but that the same had been so placed where found for some lawful purpose. It shall be further lawful for the justice, on conviction, to cause the offender's name, his place of abode, and offence, to be published in some newspaper printed and published in or near the county, city, or place where the offence has been committed, the costs of inserting the same to be paid out of the forfeited money when recovered.(f)

The next section prescribes a penalty against such as obstruct the searching above mentioned. Such as wilfully obstruct or hinder the search, or the seizure of any bread, or any ingredients found as aforesaid, or wilfully resist or oppose the search, or the carrying away of such ingredients, or bread seized as not being made pursuant to the act,

(e) 31 G. 2. c. 29. s. 29.  
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(f) 31 G. 2, c. 29. s. 30.

shall forfeit, on conviction, a sum not exceeding five pounds, nor less than twenty shillings, at the discretion of the convicting magistrate. (g)(h)

By the 34th section, the mode of proceeding to recover the penalties is fully set forth. (i) The justice is, first, to summon the party concerned before him. If he do not appear, or offer a reasonable excuse for his default, the justice shall issue a warrant to apprehend him. If he do appear, or on notice given or left for him at his usual abode he do not appear, or if he cannot be apprehended, the justice may proceed and examine the witnesses on either side on oath, and, after hearing the parties and witnesses, shall convict or acquit the accused. If the forfeiture be not paid within twenty-four hours after the conviction, the justice shall issue a warrant of distress; and if the party carry his goods out of the jurisdiction of the convicting justice, so that the penalty cannot be levied, the warrant shall be backed, and thereupon it shall be levied. If not redeemed in five days from the taking of the distress, the goods seized shall be appraised and sold, and the overplus, if any, returned, after deducting the costs of the prosecution, distress, and sale; such costs to be ascertained by the convicting justice, or the justices who backed the [\*176] warrant, if either be alive; if not, then by some other justice of the county where the conviction took place. In default of sufficient distress, and on proof of conviction and nonpayment, the justice shall commit the offender by warrant to the common gaol of the county, &c., where he shall be found for one calendar month, unless payment be made after the commitment within the month. Lastly, all such penalties and forfeitures are to be paid to the informer.

It has been said by Dalton, that millers are not to be common buyers of corn, to sell the same again either in corn or meal, but that they ought only to serve for the grinding of corn that shall be brought to their mills. (k)

If a miller take any part of the corn entrusted to him for the purpose of stealing it, it seems that he may be deemed guilty of larceny, although a felonious taking is an ordinary incident to larceny, and the corn be delivered to the miller by the party requiring him to grind it. (l)

A case on the repair of mills is deserving of attention here, although it is of course a general rule that repairs of mills must be done by such lessees as covenant to that effect. An action of covenant was brought against the defendant for the non-repair of a water-mill, and the covenant was, that one William Cumberland should leave sufficiently repaired the

(g) See s. 34, as to the mode of proceeding in order to procure a conviction.

(h) Id. s. 31. By s. 32, no miller, &c., shall act as a justice under the statute, or in executing the same, under a penalty of 50*l.* to be recovered by any informer, or person who will sue for it by action of debt, &c. at Westminster, wherein no assize, &c., or by way of summary complaint before the Court of Session in Scotland.

(i) These penalties are to go to the informers.

(k) Chap. 112, p. 253.

(l) 1 Hawk. P. C., ch. 33, s. 5.

mill, house, and buildings, and the mill-stones. The reversion of the mill had been granted to the plaintiff, and the defendant was the executor of W. C. The defendant pleaded, that W. C. assigned over all his estate to W. F., who entered and paid rent, and subsequently to the assignment of the reversion, paid rent to the plaintiff. The plaintiff demurred to this plea. The principal question was, whether the assignee of the reversion, who had accepted rent from the assignee of the term, and so had recognised him as a tenant, should charge the lessee's executor for a breach of covenant made after the assignment of the term, and after the assignment of the reversion. The Court determined, that the executor was so chargeable, for this covenant was by stat. 32 H. 8, c. 34. *en fait*, and would run with the land, and the covenantor and his executors were held to be always answerable notwithstanding the assignment, the executor being liable not by reason of the privity of the contract, but by reason of the covenant itself. But the Court added, that it would be otherwise of a covenant in land, which is only created by the law, or of a rent, which is created by reason of a contract, and is by reason of the profits of the land, wherein no one is chargeable longer than the privity of the estate continues with them,<sup>(m)</sup> and judgment was [\*177] given for the plaintiff.<sup>(n)</sup>

The maxim, "*sic utere tuo, ut alienum non laedas*," applies very strongly to the user of a watercourse. It was, indeed expressly cited in a case where the plaintiff complained of the defendant for diverting and stopping a river. The Court laid it down as a rule upon that occasion, that if one have ancient ponds replenished by channels out of a river, he is not at liberty to change the channels, if prejudice accrue thereby to another person, although the effect would be no more than to feed the ponds according to the usage.<sup>(o)</sup> This position was established at a very early period. Thus it is laid down in the Year Book of Ed. IV., that if one stop a stream which runs through his land, so that the land of another is thereby surrounded, it is a nuisance to the prejudice of that other person.<sup>(p)</sup> Again, it was said in a previous case, that if a man should throw down a fosse or hedge where water ran, by which a meadow were surrounded, an assise would lie.<sup>(q)</sup> And so it was, where the defendant cast soil and filth into a sewer, so that the water, no longer keeping its original course, surrounded forty acres of the adjoining land.<sup>(r)</sup> So, again, an action on the case was said to lie against a defendant, who built a mill to the hindrance of a river which ran by a certain mill, so that the stream ceased to run as it had been wont, and by reason of the mak-

(m) But if there be a covenant to pay rent, the liability continues, notwithstanding an assignment of the term by the lessee.

(n) Cro. Jac. 521, *Brett v. Cumberland*. S. C. 2 Ro. Rep. 63. This case was cited by counsel arg., 5 B. & C. 596, but not upon this point.

(o) Hetl. 32, *Duncombe v. Sir Edward Randall*. See 1 Wils. 174, *Brown v. Best*; and *post*, in the next Chapter.

(p) 9 E. 4, 35.

(q) 11 H. 4, 26. 83.

(r) 12 H. 4, 3. See Hard. 60, *Preston v. Mercer*.

ing of flood-gates, surrounded the plaintiff's meadows.<sup>(s)</sup> So, again, the plaintiff had judgment in an action upon the case for stopping a water-course, by which means his land was drowned.<sup>(t)</sup>

So, again, trespass was brought against the defendant for an injury to the plaintiff's fishery, by throwing down a certain weir, by which an unaccustomed and overwhelming flow of water was occasioned; and although some discussions took place on the propriety of the form of action which had been adopted,<sup>(u)</sup> no doubt whatever transpired as to the plaintiff's right to recover for the mischief which had been done.<sup>(v)</sup>

"The defendant had diverted a stream of water, but restored it undiminished in quantity, and by the time it reached the plaintiff's lands unimpaired, as it was said, in quality; and it did not appear that the plaintiff had sustained any damage. Upon this, the Lord Chancellor dissolved an injunction which had been obtained. It was observed, that in the case of lights there must be an unwarrantable user, and an injury resulting from that user. Here the admission of the defendant was consistent with the fact that the plaintiffs had sustained no injury. The Court will not take upon itself to adjudicate whether this is a nuisance or not.<sup>(vv)</sup> If the injunction should stand, the defendant's works must stop. Now the plaintiff was not hurt as to culinary purposes, nor irrigation, nor as to his cattle, nor drainage, and there was, therefore, no doubt as to the balance of inconvenience. Besides, two assizes had gone by since the works had been commenced."<sup>(w)</sup>

The building of a new mill by a person entitled to the ancient water-course may be productive of the same effects. The plaintiff complained, that he was possessed of a meadow, near to which there was a river, which ran to an ancient mill, that the defendant built a new mill, thereby raising the water, and drowning the meadow; and that he, the plaintiff, consequently had lost the profits of his meadow. Upon not guilty pleaded, the plaintiff had a verdict; and although judgment was arrested on another ground, it was agreed that this injury was quite sufficient to warrant the bringing of an action.<sup>(x)</sup>

The immemorial enjoyment of water will not, therefore, justify the party who possesses it, in performing any act to the prejudice of his neighbour; and this rule applies to protect a newly-erected house from any injury sustained by the flow of such an ancient stream. This was decided in an action of trespass, for breaking down the plaintiff's pen-stock, The defendant justified, for that he was possessed of a dwelling-house, situate near the place where the supposed trespass had been committed, and also near to a certain watercourse; and that the water, which would

(s) 16 Vin. Ab. 30, pl. 28, in the note.

(t) 1 Leon. 247, Sly and Mordant's case. S. P. 3 Leon. 174, Weshborn and Mordant's case. S. C. Cro. El. 191. 1 Ro. Ab. 104, S. C.

(u) See post, Chap. IX.

(v) 1 Ld. Raym. 274, Courtney v. Collet. S. C. 12 Mod. 164. S. C. Carth. 436.

(vv) See 18 Ves. 211, Att. Gen. v. Cleaver.

(w) 2 Mac. & G. 45, Elmhist v. Spencer.

(x) 1 Ld. Raym. 248, Prince v. Moulton. S. C. 2 Salk. 663. S. C. Carth. 386. S. C. 12 Mod. 131. S. C. Comb. 442. S. C. Holt, 192.

otherwise have flowed away from that dwelling-house, was obstructed and kept back by the plaintiff's pen-stock, weirs, and dams; in consequence of which the house was damaged by the water, and so he, the defendant, abated the nuisance. The plaintiff replied a prescription, and denied any undue or unaccustomed obstruction. It appeared that the defendant's house had been erected within six or seven years prior to the action, and that the soil on which it stood had been excavated, and so lowered about two feet, a short time before the building of the premises. Nearly four feet below the surface, the floor of the defendant's under-ground cellar and kitchen, had been sunk, and he was warned at the time that it would be subject to floods. During a very wet season, when the stream in the neighbourhood had become very copious, the defendant found water seven inches deep in the kitchen and cellar; and conceiving that it proceeded from the stream penned back for the purpose of watering the meadows, he destroyed two pen-stocks, one of which was that of the plaintiff, and the subjects of the action. The water, in fact, soaked through the bank of the nearest watercourse, namely, \*one hundred and eighty yards of feeder parallel to the back of the house; and it was shewn, that the banks of the feeders [\*179] in the neighbourhood consisted of a porous gravel, easily percolated by water. From the time of destroying the pen-stocks, the water sank rapidly, and the floor at length became dry. It was also in evidence, that although the plaintiff's pen-stock had not been repaired, the cellar of the defendant became again full of water, and continued so for a considerable time, in consequence of a general flood, occasioned by the melting of snows. The plaintiff was, however, unsuccessful in attempting to shew that the inundation had occurred from other causes than the creation of his pen-stock. But he proved that his pen-stock had been made thirty or forty years since, that it had been used uninterruptedly for thirty years, and that a pen-stock had been remembered there for seventy years. The defendant contended that the pen-stock had been enhanced, and he also called witnesses to shew that the inhabitants of Chichester, (which is subject to floods from the Lavant, the river which supplies the feeders above mentioned,) had at different times abated pen-stocks, and amongst others, the pen-stocks which the defendant had destroyed. Mr. Justice Heath, who tried the cause, put it to the jury, first, whether the flooding had been created by the penning back of the water, and said he thought the subsiding of the water left no doubt upon that point. Then the question would be, whether the pen-stock had been properly kept shut, or shut for an unreasonable length of time, so as to occasion an annoyance to the defendant's house. If the plaintiff had possessed an uninterrupted right to raise the pen-stock to a certain height, it would not derogate from the right, that the defendant had thought proper to build a house, and make his kitchen deep in the ground: but the plaintiff's enjoyment had not been peaceable, for the inhabitants had from time to time abated the pen-stock whenever they found it inconvenient. The learned Judge considered also, that there had been conclusive evidence, that the pen-stock had been enhanced from one foot eight inches, to three feet five inches, and said, that if the jury should be of that opinion, they ought to

find for the defendant, which the jury accordingly did. But a new trial was moved for, first, because the defendant's rejoinder had not denied the plaintiff's right to the pen-stock; next, because the pen-stock had not been, as it was urged, the cause of the mischief; and, lastly, because a right to destroy a prescription could not be established in respect of a newly-built house, or, indeed, under any circumstances. The Court, upon this, although they agreed that the pen-stocks could not be continued, much less enhanced to the prejudice of another person, observed that such of the issues should, nevertheless, have been found for the [180] plaintiff as went to deny the plaintiff's right to \*erect any pen-stock, because without them he could not have the benefit of the out which must have been made at some time out of the river, for the benefit of the land; and they made the rule for a new trial absolute.(x) And Mr. Justice Lawrence held upon the main point, that the plaintiff might pen the water as he would, until he should damage his neighbour, but that his right must terminate as soon as injury should arise. Had there been an ancient house, added the learned Judge, into which the water flowed immemorially by reason of the pen-stock, it would have been evidence of a grant.(y)(z)

The law respecting water spouts is in principle the same. Where one had a right to enter the yard of another, and he fixed there a water spout, by which the rain fell upon the land of the plaintiff, although there was some dispute as to the form of the action, the right to sue was clearly admitted. A man might have a right for the rain water to fall from the eaves of his house into a yard belonging to another person, and yet cannot justify putting up a spout, and thus collecting the water in a larger body to fall into that yard.(a)

This last, together with the following case, although strictly speaking, they do not concern the user of watercourses, are introduced here as being illustrative of the subject under consideration. An action was brought on the case for damage done to the plaintiff's colliery. The defendant had caused great quantities of water to be conveyed through other col-

(z) 3 Taunt. 99, *Cooper v. Barber*.

(y) 3 Taunt. 110.

(x) The Court did not seem, upon this occasion, to have been unanimous as to the illegality of this pen-stock under the circumstances. Mr. Justice Heath clearly seems to have thought that the plaintiff might have persisted in penning back his water, according to the immemorial usage, while Lawrence, J., as obviously maintained, that such an usage could not be tolerated to the prejudice of a neighbour, who had newly built a house into which the water flowed. Reason seems to point out, on the one hand, that if a man wilfully resolve to build on a spot where he knows that he shall be molested by the exercise of an immemorial right, he must abide the consequences of his folly, unless, indeed, the other party, as in the principal case, exceed the extent of his ancient custom. On the other hand, there would be a check to all improvement, if a proprietor of water, even, although he should act consistently with the usage, were warranted in continuing a nuisance to a neighbouring dwelling, when he might probably at a small expense to himself avert the mischief, and direct his stream into a different channel. This would be consonant to the maxim, that he ought so to use his own privileges, as to avoid an act of prejudice to others.

(a) 2 Ld. Raym. 1399, *Reynolds v. Clarke*. S. C. 1 Str. 534. S. C. 8 Mod. 172. S. C. Fort. 212.



lieries into that of the plaintiff, and this he had done in his own colliery within his own soil; and although there was much discussion upon the debated question, whether trespass or case were the "proper [\*181] remedy, it was not doubted but that the action lay for the damage sustained; and, in effect the plaintiff was permitted to enter up his judgment.(b)

The plaintiff and defendant occupied collieries adjoining to each other. The defendant's predecessor, with whom however, the defendant had no privity, made holes, called "thyrings," in a barrier of coal which separated the collieries. This was a trespass on the part of the predecessor of the defendant, as the barrier belonged to the plaintiff. The defendant, in working his mine broke down a seam of coal of his own, in consequence of which the water flowed into the plaintiff's mine through the "thyrings." The cases of *Tenant v. Goldwin*,(c) *Rosewell v. Prior*,(d) and *Haward v. Banks*,(e) were cited for the plaintiff, to shew that the defendant lay under an obligation of common right to have kept this barrier in so sound a condition as to have prevented the grievances complained of. But *Tenant v. Goldwin*, was distinguished, for that was a case in which the defendant's duty to repair a house and office adjoining the premises of the plaintiff came in question. *Rosewell v. Prior* was an action on the case for a nuisance, but mines are not a nuisance. Therefore the Court held, that no duty, neither special nor general, lay on the defendant to do this repair, and judgment was accordingly given in his favour.(f)

This is different from wilfully allowing a communication into an adjoining mine to remain open, so as to suffer water to flow through it, in order to compel other parties to close such communication. A tenant of a mine was restrained on motion from allowing such an opening.(g)

If there be evidence of a grant, the user of a watercourse in a particular manner might be sanctioned, which, but for such evidence, would be illegal. This principle may be collected from a decision recently quoted.(h) And it seems to have been recognised in a subsequent case, where the plaintiff's cause of action was stated to be, that the defendant, by a wrongful construction of their flood gates and machinery, so penned up and obstructed the course of a river, as to occasion an overflow \*of water upon the plaintiff's farm. The matter was referred to arbitration, and it then appeared that the defendants were occupiers [\*182] of a mill and that the plaintiff was the occupier of certain meadows adjoining to the defendant's mill pond, and situate a mile higher up the stream

(b) 2 Burr. 1113, *Haward v. Banks*.

(c) 2 Ld. Raym. 1089. S. C. 1 Salk. 21. 360. Holt's Ca. 500. 6 Mod. 311.

(d) 1 Ld. Raym. 713. S. C. 2 Salk. 460. Holt's case, Ca. 500. 6 Mod. 116. 12 Mod. 635.

(e) 2 Burr. 1113, and 4 Ed. 4. 7, was also cited.

(f) 18 L.J., C. P. 172, *Smith v. Kenrick*.

(g) 7 Beav. 127, *Earl of Mexborough v. Bower*.

(h) *Cooper v. Barber*, ante, p. 178, 180.

than the mills. Certain ditches traversed these meadows, the level of which was below the water level of the full mill pond, and they were intended to discharge the drainage of the country into the river. The former occupier of the plaintiff's land had, about thirty years before the action, erected at the mouths of these ditches certain pen-stocks and valves,<sup>(i)</sup> and had occasionally repaired them, although they were disused and in an inefficient state at the time of the dispute in question. The plaintiff's land had been partially injured by the stagnation of the water. The defendants had recently purchased an interest in the mill. In the time of the old tenant the machinery was in a very imperfect state, the water wheels and waste hatches were much out of repair, and thus a great waste of water ensued. The level of the head of water in the mill pond was then drawn down in a few hours below the level of the meadows, and the water from the ditches being consequently discharged with ease into the bed of the mill pond, the plaintiff's land sustained but a small damage. But the defendants had, since the plaintiff's occupation, rebuilt the mills on an improved principal, and had tightened the waste water gates and mill hatches; and so, using their water economically, it was rarely drawn down, the mill pond being accordingly, for the most part at the same level. Thus it happened, that the water in the ditches accumulated, and stagnated for a much longer time than formerly on the land of the plaintiff; whilst, on the other hand, it was shewn to the satisfaction of the arbitrator, that the improved mill and waste water gates did not confine the water in the mill pond to so high a level as before. The ground sills had remained unaltered. No evidence was given as to the state of the mill, anterior to the occupation of the last tenant previous to the defendants. The arbitrator awarded, that the defendants should within four months, make an over-fall or tumbling bay for the discharge of the water of the river at a convenient place, between the plaintiff's meadows and the waste gate of the mill, and that the defendants [188] should pay 150*l.* to the plaintiff, upon which the mutual releases were to be executed up to the date of the submission. It was moved afterwards, to set aside this award amongst other objections, because to make a tumbling bay would be waste on the part of the defendants, they having sworn, that they had no permission from their lessor to erect it. And the Court considered this objection good pro tanto, and set aside the award as far as regarded the tumbling bay, but confirmed it as to the residue. Mr. Justice Heath observed, that damages could not be given unless it were for penning the water too high, and that if it were not penned *higher* than usual, the keeping it for a *longer time* than usual would not entitle the plaintiff to recover any thing.<sup>(k)</sup>

(i) They freely opened to the river whenever the water on the land side "was so high, that its pressing on the valve outwards overcame the contrary pressure of the water in the river, and thereby let out the water from the ditches into the bed of the river; and whenever the water in the river was higher than the water in the ditches, its pressure on the outsides of the valves kept them closely shut against the upright posts to which they were applied, and prevented any water from the river from entering the ditches." 5 Taunt. 458.

(k) 6 Taunt. 454, Alder v. Savill and others. See also 7 East, 195, and post, Chap. IX.

Here, as the water of the mill had always flowed over the adjoining meadows, there seems to be clear evidence of a grant; and then this case is reconcileable with *Cooper v. Barber*, inasmuch as in the latter case, the injury complained of was done to a *new house*.

The user of a watercourse, if enjoyed under a lease, must be subject to the covenants contained in the lease, as far as they respect the thing demised. In the following case the judgment of the Court was for the defendant, because the covenant imposed upon him did not affect the subject of the property leased. In the demise, by which liberty was given to erect a silk mill and make a watercourse, there was a covenant against hiring any persons to work in the mill who were settled in other parishes, without a parish certificate. The lessee covenanted for himself, his executors, administrators and assigns, and the premises came to the defendant by assignment. The declaration was demurred to generally. The Court were of opinion, that, as the assignee was specifically named, although the thing were not in esse at the time, it would bind him, if it affected the nature, quality, or value of the thing demised; independently of collateral circumstances; or if it affected the mode of enjoying it. But in the case in question, the covenant did not immediately affect the thing demised, but only, if at all, in respect of collateral circumstances. If there had been a covenant by the lessee to make a communication by water from the demised premises, through other person's lands to another place, to facilitate the access to a market, the value of the reversion would be materially affected by the performance or non-performance of such a covenant; but it could not bind the assignee, because all the cases show that the assignee is not bound, unless the thing to be done is upon the land demised. [\*184] The defendant accordingly had judgment.(7)

The owner of a steam engine had laid down a pipe which communicated with a canal, but they used the water for other purposes than for condensing steam, such condensation of steam being permitted by an act of Parliament, and, moreover, they used more water than was wanted for the condensing of the steam. It was objected against the right of the canal company to recover, that a clause of the act had empowered certain commissioners appointed under its powers, to settle all disputes between the company and any persons desirous of taking water out of the canal. And it was further objected, that no specific damage had been alleged. But the Court held, that the special power adverted to had not deprived the plaintiffs of their right of action, and that the objection for want of alleged damage would not hold, and at all events, not after verdict.(m)

Cutting a trench in a field, whereby the land is improved instead of being injured, is not waste.(n)

(7) 10 East, 130, the Mayor, &c. of Congleton v. Pattison.

(m) 18 L. J., Q. B. 293, Rochdale Canal Company v. King and others.

(n) Dy. 361 (b), Altman's case.

[\*185]

## \*CHAPTER IX.

## OF OBSTRUCTIONS AND OTHER INJURIES, WITH THE REMEDIES IN SUCH CASES.

It will be readily conceived, that many mischiefs, and various descriptions of damage, are occasionally committed, in derogation of the rights concerning which we have been treating. Our object will be to enumerate the principal of these damages in the following Chapter, not forgetting the remedies which may be found applicable to the respective injuries detailed.

To take a short general view of the subject, before we proceed to particulars, there are, in the first place, obstructions to navigation, such as toll improperly demanded, duties, and other exactions not warranted by acts of Parliament. So, again, there are many nuisances against which the Legislature has provided expressly, as the choking up of public waters with ballast, slate, gravel, &c.; the erection or continuance of weirs which cannot be legally kept up to the hindrance of navigation, looks set up without proper authority, wharfs, &c. So, further, there may be a serious obstruction by diverting the stream of a public river; and such an offence has always been severely visited.

A neglect to cleanse a river often creates an obstruction; and, consequently, the party upon whom the obligation of repair lies, must be punished for the default. The undue exercise of a right of fishery, it will be found, may occasion the commission of this offence, for the public benefit must supersede a private privilege, when it becomes necessary that the one should yield to the other.

Having considered the obstructions to navigation, and detailed their incidental remedies, we shall proceed to a similar inquiry with regard to fisheries, and we shall find that many such mischiefs, as weirs, nets, &c., are occasionally made the subjects of complaint and punishment. So, [\*186] again, there are \*several injuries to private rights of fishery, which it will be necessary to notice, as the larceny of the fish, malicious mischiefs done to fish ponds, nuisances of various kinds, &c.

Injuries done to the miller will next claim our attention, and we shall almost unavoidably touch upon obstructions to watercourses in considering this point; for there are few mischiefs so commonly sustained by the owners of mills, as the disturbance of their waters. And, lastly, the damage occasioned by an illegal stoppage, diversion or misuser of private streams, will come before the attention of the reader. This last is a subject of considerable importance, and the consideration of it is of no infrequent occurrence.

Obstructions to navigation have always been regarded with great jea-

lousy. In whatever shape the mischief appears, both the common and written law are always prepared to check its advance; for the prosperity of the people depends too much on their commercial advantages, not to make them sensible of the value which a free and uninterrupted intercourse confers. Thus it is, that impediments occasioned by the demand of toll have frequently been resisted with success; or, where toll has been suffered to exist, that the imposition of it has not been conceded by the Legislature, without great accompanying benefits. So it is, again, that piracy (a subject with which we do not profess to meddle here), is universally denounced as detrimental to the best interest of commerce. The principal annoyances, however, which it falls within the scope of our undertaking to notice, are found to occur in havens, roads, channels, docks, or navigable rivers.

The Legislature has interposed its authority on many occasions, to prevent nuisances to these public rights. Thus, for the preservation of channels, havens, &c., it is enacted that no person shall cast or unlade out of any manner of ship, crayer, or any other vessel, being within any haven, road, channel, or river, flowing or running to any port, town, or to any city, borough, or town within this realm, &c., any manner of ballast, rubbish, gravel, or any other wreck or filth, but only upon the land above the full sea mark. The penalty for this offence was declared to be 5*l.*, half for the King, and half for the informer, who might sue by bill, plaint, original writ, or information, in any of the King's Courts of record, no wager of law, essoin, or protection, being allowed.<sup>(a)</sup>

Next followed the statute of Geo. II., explaining this \*offence more particularly, and providing against the inconveniences of [\*187]. sunk or stranded ships.

The offence of casting out ballast having increased, the last mentioned statute ordained, that if any master or owners, or any person acting as master of any ship, pink, crayer, lighter, keil boat, or any other vessel whatsoever, shall cast, throw out, or unlade, or, if there should be cast out, &c., from any such ship, &c., being or riding within any haven, port, road, channel, or navigable river within England, any ballast, rubbish, gravel, earth, stone, wreck, or filth, but only upon the land where the tide or water never flows or runs, any justice for the county, city, &c., where or near which the offence is committed, may, upon information given, and such justice is authorized and required, to summon or issue out a warrant to apprehend and bring before him the master, &c., of any such ship, &c., against whom the complaint may have been made. The justice is empowered, upon appearance, or default, to examine into the facts; and if it appear that any ballast, &c., has been cast, unladen, or thrown out of any ship, &c., whether the proof be by confession, or on view of the justice, or on the oath of a witness, the master or masters, or persons acting as such, shall be adjudged to be the offenders against the act, and shall,

(a) 34 & 35 H. 8, c. 9, s. 6.

on conviction, incur a forfeiture of not more than 5*l.*; nor less than 50*s.*, at the discretion of the justice, one-half to be paid to the informer, and one-half to the overseers of the poor of the parish, town, or place, where the conviction shall be pronounced, for the use of the poor there.<sup>(b)</sup> The next section provides for the recovery of the penalties. They are to be levied by distress and sale, either of the goods and chattels of the persons so convicted, or of the ship, &c., or of the tackle, apparel, or furniture, by a warrant under the hand of the justice, which he is empowered and required to make, and to deliver to the constable, or tythingman, or other private officer of the parish, &c., where such warrant is to be executed. The overplus (if any) after the distress and sale, is to be rendered back to the owner; and for want of sufficient distress, the justice shall commit the master, or acting as such, so being convicted, to the gaol of the county, city, or town corporate, or to the House of Correction for the county, there to remain for two months, or until payment be made of the penalties and forfeitures, or so much as for the nonpayment of which such commitment shall be.<sup>(c)</sup>

Subsequently, another statute was passed, some of whose provisions relate to this subject. Thus, by 54 Geo. 3, c. 159, s. 11, \*it was [\*188] declared, that if the owner, master, or other person, having the charge of any private ships of war, transport, or other private or merchant ship, &c., or craft whatsoever, or any person working any quarry, mine, or pit near to the sea, or any harbour, haven, or navigable river; shall cast, throw, empty, or unlade, or cause, &c., out of any vessel, or from the shore, any ballast, stone, slate, gravel, earth, rubbish, wreck, or filth, into any ports, roads, roadsteads, harbours, &c., so as to obstruct the navigation, or in any place where the same may be liable to be washed into the sea, or into such ports, &c., either by ordinary or high tides, or by storms or land floods, such person shall forfeit a sum not exceeding 10*l.* besides all expenses necessarily incurred in removing such matters to a proper place, to be recovered in such form of commitment for nonpayment, as in cases of penalties, &c., under the act; except stones, rocks, bricks, lime, or other materials used towards the building or repairing of any quay, pier, wharf, drawbridge, or other building, on the banks or sides of any port, &c., or any materials for repairing any highway.

The next section prescribes the mode of unloading ballast. It ordains, that no ship, &c., or craft whatsoever, shall unlade on any part of the shore (except on some wharf properly constructed for the purpose,) any ballast, &c., except at high water, or within two hours before or after; and that for any such purposes, such ships, &c., shall approach the shore as the tide and draught of water of such ships, &c., will admit, and shall, under no circumstances, in no situation, deposit any of the said matters below low water mark at neap tides; and that every vessel drawing above eleven feet of water at the stern, shall unlade all such materials into

(b) 19 G. 2, c. 22, s. 1.

(c) *Id.* s. 2.

some lighter, barge, or boat, in order that the same may be conveyed as near to the shore as possible at the time of high water.(d)

Moreover, all such ballast and other matters shall, upon such occasions, be only cast on shore from the side of the ship, &c., nearest to the land, and not otherwise, upon pain of forfeiting a sum not exceeding 10*l.*, besides the expenses of removal, to be recovered in the same manner as has been mentioned in the eleventh section.(e) And, further, to prevent damage to the shores or banks of the ports, harbours, or havens in the kingdom, no person shall take any ballast, or shingle, or any portion of the shores or banks of any port, &c., from which the commissioners, for executing the office of Lord High Admiral, shall find it necessary for the protection of any such port, &c., or the limits thereof, by order under their hands, or any three of them, or of \*his or their secretary, and published in the *London Gazette*, shall prohibit the taking or re- [\*189] moving of such shingle or ballast, upon pain of forfeiting 10*l.* for every offence.(f) The next section directs the use of one or more tarpaulins, properly stretched and spread, for the purpose of taking in or discharging ballast in order to prevent the ballast from falling into the sea, or into any harbour, &c.; and the forfeiture for disobedience to this order is 5*l.* for each offence.(g) But the Lord High Admiral, or the commissioners, &c., may dispense with these provisions relating to ballast by license under hand and seal.(h) The act then proceeds to guard against the improper sinking of vessels. It declares, that as often as any ship, &c., or any craft, shall be sunk or stranded in any port, &c., where there may be a harbour master, the harbour master, or any commissioner of the navy residing near, shall, in case the owner, master, or other person in charge of such ship, &c., shall refuse or neglect to weigh and raise the same for twenty-eight days following, to cause such ship, &c., to be weighed and raised, and shall cause the same, with all the furniture, &c., and all goods, &c., found in the same, to be sold by auction or otherwise, and thereby to pay the expenses of weighing and raising the ship, &c., and clearing the port, &c., and also the charges of the sale, returning the overplus, (if any) to the owners.(i) The harbour master, and other officers, are declared to be indemnified for any thing done in pursuance of the act.(k) However, if the harbour master, &c., shall not proceed to weigh or raise the vessel, &c., within two calendar months next after the twenty-eight days, the owner, &c., may proceed to weigh and raise it, as if the act had never been passed.(l) Commissioners of the navy residing at any port, are declared to be justices for the purpose of executing the act.(m) The penalties are to be sued for within twelve calendar months after the offence before any commissioner of the navy, or justice residing at or near the place where the offence has been committed, one-half to go to the King, and the other half to the informer. A warrant may be granted, and in case of nonpayment, the offender may be imprisoned for any time not to exceed three months.(n) Any com-

(d) Sect. 12.

(e) Sect. 13.

(f) Sect. 14.

(g) Sect. 15.

(h) Sect. 16.

(i) Sect. 17.

(k) Sect. 18.

(l) Sect. 19.

(m) Sect. 20.

(n) Sect. 21.

missioner residing at or near such port, &c., or any justice for any county, &c., next adjoining to any such port, &c., where any offence may be committed, may proceed to execute the act, as if the offence were committed within their respective jurisdictions, although it have been committed out of the limits of their authority, or \*out of the body of any [\*190] county.(o) A form of conviction is appended, and is to be written on parchment, and filed away with the clerk of the peace, and the *certiorari* is taken away.(p) Moreover, a penalty of 10*l.* is awarded against any witness who neglects to attend a summons, or refuses to be examined, upon appearance, without lawful excuse, to be levied as above.(q) And if such witness swear untruly, he or she shall incur the penalties of perjury.(r) An appeal is given to the sessions within three calendar months after the conviction, to be held for the county where the matter of appeal shall arise, ten days notice being given to the person appealed against, and a recognizance being entered into before a commissioner of the navy, or justice with two sufficient sureties, and the justices at sessions may determine the appeal, and award costs.(s) The limitation of the time for bringing actions for any thing done in pursuance of the act, is fixed at six months; the general issue may be pleaded, and the special matter given in evidence, and treble costs are awarded against the plaintiff if he fail in his action.(t) The last is a saving clause of all rights of property, privileges, jurisdiction, and powers of conservancy, held by any corporation, or lords or ladies of manors, or other persons whatsoever, in or over any port, &c., or the banks, shores, or sides thereof. And there shall be no repeal of any provision relating to this subject in any former act, unless it be expressly repealed by this act.(u)

Having mentioned the enactments and punishment for throwing out ballast, &c., we come next to shew the statutable remedy in cases of ships sunk or stranded, or run on shore in harbours, ports, channels, or navigable rivers. It is provided, that as soon as any ship or vessel shall be sunk, stranded, or run on shore, in any harbour, &c., or shall be brought or drove in, or be there in a ruinous or shattered condition, and permitted to remain there, and the owner, or some other person having, or pretending to have, any property therein, or the command or power thereof, or any other person or persons by any of their order, privity, or assent, shall begin to take down, or convey away any of the rigging or tackle, or if there shall not be any person to take care of the said ship or vessel, any justice for the county, or place where, or near where such fact, accident, or offence shall happen, upon information thereof, shall summon, or issue out a warrant to bring before him the owner, or other person pretending [\*191] to have the command or power over such ship or \*vessel. Then, upon appearance or default, the justice shall examine into the case, and if the matter be proved, the justice is authorized and required to issue a warrant for seizing and removing the ship or vessel, and also the rigging and tackle, as the justice shall direct; and if the owner

(o) Sect. 22.

(s) Sect. 28

(p) Sect. 23.

(t) Sect. 27.

(q) Sect. 24.

(u) Sect. 28.

(r) Sect. 25.



or such other person as aforesaid, shall not, within five days, give security, according to the approbation of the justice, to clear the harbour, &c., of any such ship or vessel, and of all wreck and parts belonging to the same, and pay the charges of seizing and removing, and disposing of such ship or vessel, tackle, or furniture, then to cause the hulk, rigging, or tackle to be sold, and to pay the charges of clearing the harbour, &c., where the ship or vessel may be, out of the money arising from the sale, and also the charges of the seizure, removal and sale, rendering the over-plus (if any) to the owners of the manor where such transaction shall happen.(v) The next section ordains, that each justice shall execute this act within his jurisdiction, although he be rated and assessed, or do actually pay for the maintenance of the poor of any parish, town, or place, in which any conviction shall be pronounced.(w) The conviction is, moreover, declared to be final, and not to be appealed from or to be removed into any Court of record at Westminster.(x)

But there are these provisos :—First, That no distress is to be sold until after the expiration of five days from the day of making it; and that any person may redeem the distress before the expiration of those five days, by paying the money due to and for the uses and purposes of the act, together with the costs and charges of, and for making, seizing, and detaining such distress.(y) Provided further, that nothing in the act shall extend to take away, abridge, diminish, or alter, any right, benefit, or lawful use, that the lord or lords, lady or ladies, of any manor adjoining to or bordering upon any haven, port, road, channel, or river, or to the banks, shores, or sides thereof, or any fishery, manufacture, or royalties therein, nor extend to the casting out, unloading, or throwing out of any ship, &c., any stone, rocks, bricks, lime or other materials, used or to be used in or towards the building, amending, repairing, and keeping in repair, any quay, pier, wharf, wear, or bridge, on the banks or sides of any haven, &c., within the realm. On the contrary, the act shall be construed and taken to prevent the mischiefs to be done in, or to, or upon, the said havens, &c., which may any ways tend to obstruct, prejudice, incommode, hinder, or do any annoyance in the said havens, &c., or \*prejudice the navigation therein, and not otherwise.(z) [\*192] Lastly, nothing shall extend to take away, abridge, diminish, or limit, any former or other jurisdiction, or right, or remedy, to punish any nuisance to be done or omitted in any haven, &c.(a)

Obstructions to public docks are also punishable. Thus, one L. was indicted for a public nuisance to Billingsgate Dock. It was stated, that B. dock was a common dock for small provision ships coming to the London market, but that no large ship ought to come there; yet, that the defendant brought a great ship of 300 tons into it. It was moved to quash this indictment, by reason of the circumstance of saying, that

(v) 19 G. 2, c. 22, s. 3.

(w) Sect. 4.

(x) Sect. 5.

(y) Sect. 6.

(z) Sect. 7.

(a) Sect. 8. An indictment for a nuisance lay at common law for this offence.  
14 Vin. Ab. 395, pl. 16.

a dock was common, and at the same time, that it would be a nuisance for great ships to come here. But by the Court: Why may there not be a common dock only for small ships, as well as a *common pack and horse-way*? Should a man with a cart use such a way, so as to plough it, and render it less convenient for riders, will not that be a nuisance indictable? Besides, the Court said they would never quash indictments for nuisances, and they put the defendant to demur, which he did.<sup>(b)</sup>

An obstruction in a public river is also a nuisance, and may be dealt with as such.

It will be our object to inquire what are obstructions of this nature, and what remedies are available for the purposes of removing them, or punishing the authors of the nuisance. For it is an offence of stopping up the highway, a public river being in law considered to be a highway; and it was held to be one of those transgressions which the King could not dispense with.<sup>(c)</sup> The principal annoyances which concern the public in this respect, seem to be those which impede their rights of navigation and of fishery. The latter will be considered separately in a subsequent part of this Chapter.

There are various acts which disturb the course of navigation. Diverting the accustomed stream; throwing improper lumber into it; neglect to place buoys; erecting wharfs, so as to narrow the river; mooring barges, so as to obstruct the channel: all these, with many others, are acts for which the party committing them may be called to account.

[\*193] \*The continuance of weirs was forbidden by Magna Charta. That statute declares, that "all weirs from henceforth shall be utterly put down, by Thames and Medway, and through all England, but only by the sea coast."<sup>(d)</sup> The annoyance, however, having been renewed to some extent, it was enacted, that whereas the common passage of boats and ships in the great rivers of England be oftentimes annoyed by the inhansing of gorees,<sup>(e)</sup> mills, weirs, stanks, stakes, and kiddles,<sup>(f)</sup> all such gorees, &c., which be levied and set up in the time of King Edward, the King's grandfather, and after, whereby the said ships and boats be disturbed, that they cannot pass in such river, as they were wont, shall be cut and utterly pulled down, without being renewed. The statute then directs, that writs shall be sent to the sheriffs, in order that they may execute the ordinance, and that justices should be assigned at needful times.<sup>(g)</sup> A grievous complaint was soon made that the last mentioned statute had not been complied with; and, therefore, the penalty of one hundred marks was prescribed against such as should repair the annoyances mentioned above, being duly attainted; the fine to be levied

(b) 6 Mod. 145, the Queen v. Leech.

(c) Vaugh. 340.

(d) Chap. XXIII.

(e) A deep pit of water or gulf. Co. Litt. 5.(a)

(f) Open weirs, whereby fish are caught. 2 Inst. 38.

(g) 25 Ed. 3, stat. 4, c. 4.

by estreats of the Exchequer. The same penalty was also denounced against such as should "inhanse" such weirs, &c.(h) The mischiefs thus prohibited were, however, so far from being abolished, that we find another statute soon afterwards, confirming those which had gone before, and conferring other powers. For commission were ordered to go forth, to sufficient justices, in every country, for the purpose of surveying the waters and great rivers, and to execute the statutes, as well by their advice as by inquests taken, within franchise and without, as often as need might be. These justices, are, moreover, to survey the weirs, mills, &c., made before King Edward's time, and to correct, pull down, and amend them, if too much enhanced or "straited;" saving also a reasonable substance of weirs, mill, &c., so in old times made and levied. The freholder was ordered to make the abatement of these nuisances at his own cost, when directed to do so, within half a year after notice, and upon pain of one hundred marks. The penalty of one hundred marks, against offenders who might enhance the weirs, or strait, or repair them, was re-enacted, with liberty for any one aggrieved to have his right and remedy.(i) A similar statute was passed in the same reign, upon the same grounds and complaints, and moreover, because the young fry of fish had been destroyed and \*wasted; and it was also alleged, that many [\*194] people had perished in consequence of the obstructions. The justices, besides, appointed under the commissions, were to have 4s. per day for travelling, to be paid them by the sheriff, out of the issues and profits of the estreats, and which sums were to be allowed the sheriffs, in the Exchequer.(k) A solemn confirmation of all those statutes respecting weirs was made in the reign of Edward IV. It was declared, that divers fish garths, mills, mill dams, mill stanks, locks, ebbing weirs, stakes, kedels, hecks, or flood gates, had been enhanced, levied, and enlarged, so as to destroy the fish, and endanger the navigation. And then the old penalty of one hundred marks was re-enacted against offenders, giving them, however, three months' notice to remove the impediment.(l) And further, it was ordained, that if the offender, or his heir or heirs, assignee or assignees, or any of them, should defer or continue the same default, contrary to the award of the commissioners, he should forfeit one hundred marks for every month after the three months ended, half to the King, and half to him who should sue for the same by action of debt.(m)

The like process, rule, judgment, and execution, was to be allowed in this as in other actions of debt at the common law, and the defendant might not wage his law, nor have any protection or essoin of the King's service.(n) The penalty against the heir or assignee, for continuing the nuisance in question, was also fixed at 100 marks per month for every default.(o)

(h) 45 Ed. 3, c. 2.

(k) 4 H. 4, c. 11. 1 H. 5, c. 2.

(m) Sect. 4.

(o) Sect. 6.

(i) 1 H. 4, c. 12.

(l) 12 E. 4, c. 7, s. 3.

(n) Sect. 5.

The words of Lord Ellenborough, when giving judgment against the erection of a stone wear, are worthy of attention. His Lordship confirmed the authority of the old statutes which we have mentioned. "The erection of weirs across rivers was reprobated in the earliest periods of our law. They were considered as public nuisances." His Lordship then cited the Chapter of Magna Charta, and the subsequent enactments. "I remember," continued he, "that the stells erected in the River Eden, by the late Lord Lonsdale and the Corporation of Carlisle, whereby all the fish were stopped in their passage up the river, were pronounced in this Court, upon a motion for a new trial, to be illegal, and a public nuisance." (p)

Not even a legal grant by the Crown can make a nuisance of this kind legitimate. The right of the public is paramount to any right [\*195] of property in the Crown. (q) To an action of trespass the plea was, that a weir had been built across part of a navigable river. The replication confessed the *L. i. q.* to be part of a navigable stream, but stated it to be a part of the river quite distant from the public channels; and added, that the said part was not part of a public navigable river. This was held good after verdict. (r) The report of this case, however, in 8 Ad. & El., does not quite bear out the above. According to that report, it is legal to have a weir, although it does obstruct the whole or part of a navigable river, if granted before the reign of Ed. I. The weir was appurtenant to a fishery. Evidence of the existence of such a weir before the time of Ed. I., was held to warrant the presumption of a grant. Supposing that the bed of the river should change, the weir would not become illegal by reason of its thereby obstructing the only navigable passage remaining, it having originally obstructed a part. However, the position that the Crown may not erect a weir to prejudice the public is true, if there be no right on the part of the Crown in the first instance. It was also held, that the plaintiff might prove user, in order to raise the presumption of such a grant. (s)

Upon a review of these statutes, it was determined, that the clause in Magna Charta extended only to kydels, *i. e.* upon wears for taking fish, and that the abatement of mills, mill-stanks, and causeys, was first ordained by the statute 25 Ed. III., which directs such only to be abated as were levied or erected in the reign of Ed. I., or after. But it was resolved at the same time, that the act of Hen. IV. gave an authority to correct and amend mills, &c., which had been made *before the reign of Ed. I.*, upon a survey and discovery of their having been enhanced: saving always reasonable substance, &c., as in the act above set out. And it was, moreover, determined, upon the same occasion, that none of these acts were repealed by the Bill of Sewers, 23 Hen. 8, c. 5, for that the commissioners appointed by that act were limited to proceed according to

(p) 7 East, 199.

(r) S. C.

(q) 3 Nev. & P. 606, Williams v. Wilcox.

(s) 8 Ad. & El. 314, Williams v. Wilcox.

the statutes and ordinances before made. The Judges, therefore, certified the lords of the council that the aforesaid acts continued in force. (t)

\*Mill dams and wears are also subject to the authority of Commissioners of Sewers. (u) [196]

Even at the common law, any encroachment upon a public stream was considered to be purpresture; that is to say, the making of that several and private, which ought to be common to many. (v) And Glanvil calls the diversion of water from its right course a purpresture. (w) But it should be observed, that the power of the commissioners of sewers succeeded to the original jurisdiction possessed by justices appointed for the above purposes, and that their authority extends to alter and amend all annoyances of the description which we have mentioned, according (to use the words of the statute) to their wisdoms and discretions. (x)

As it is not our intention to describe all the prohibitions of annoyances upon particular rivers, which are to be found in our statute books, the reader is referred to the note for some of the enactments upon the subject. (y)

It was enacted by another clause in Magna Charta, that no banks

(t) 10 Rep. 138. The case of Chester Mill, upon the river of Dee. S.O. 18 Rep. 38. According to the civil law, it was not lawful to divert water from a public stream to a private mill, although it were done with license from the prince, if thereby the public right was impeded. Schultes, p. 128, citing *Craig de fluminibus*.

(u) See Woolrich of Sewers.

(v) 2 Inst. 38.

(w) Lib. 9, c. 11.

(x) 23 H. 8, c. 5, s. 3.

(y) As to the River-Lea, see 3 H. 8, 5; 9 H. 8, 9. 13 El. c. 18. As to the Severn, 9 H. 8, c. 5. 19 H. 7, c. 18. The River Tone, 10 & 11 W. 3, c. 1. See 8 T. R. 286. The above statutes having directed that an account of the receipts and disbursements of the conservators should every year be examined, stated, corrected, and allowed by the Bishop of Bath and Wells, and the Justices for Somersetshire, at their quarter sessions, after which a distribution of the surplus profits (if any) was to be made; it was held, that the justices at sessions could not in a succeeding year revise or correct any errors in the account which had been allowed in the preceding year. Such mistakes might be rectified in the Court of Chancery, but the Court of King's Bench declined to interfere farther than to quash the order of sessions. *Rex v. Conservators of the River Tone*.

Certain conservators of river banks were to expend funds for constructing and executing all works, &c. for keeping the banks in repair. A bill was filed requiring them to refund certain expenses they had incurred in opposing a bill in Parliament, which they considered would be injurious to the property. To this bill there was a demurrer for want of equity, and the Vice Chancellor (Bruce) thought they were not justified in applying the rates. But this opinion was revised by the Lord Chancellor. For every trustee is to be allowed the necessary and proper expenses incurred in protecting the property committed to his care. The defendants had a right to protect the navigation from immediate injury; and they must have the same right where the injury threatened is indirect. 2 Phill. Ch. 216, *Bright v. North*. 16 L. J. Cant. 255.

Whereas, when the commissioners of waterworks at Southampton applied the water rates, levied under their act towards the expenses of obtaining a new act of Parliament for extending their powers, an injunction was granted by the Vice Chancellor. And *Bright v. North* was distinguished, because, in that case, it was not necessary to apply to the Legislature; the conservators there were only pro-

[\*197] should be defended, from henceforth, but such as were in \*defence in the time of Hen. II., by the same places and the same bounds as they are wont to be in his time.(z)

Lord Coke explains this to mean, that no owner of the banks of rivers should appropriate the rivers to himself, as to defend or bar others from having passage or fishery there, otherwise than they were used in the reign of Hen. II.(a)

But the Mirror declares this act to be out of use; for many rivers were then appropriated, which in the time of Hen. II. had been common for fishing and passage.(b)

The *principle* of the clause referred to in the Magna Charta has been considered as discountenancing all obstructions to navigation, although, in effect, it was held to forbid the continuance of open weirs only. And therefore, on an information filed against the defendant for building locks on the Thames, Lord Chief Justice Holt, said, that to hinder the course of a navigable river was against Magna Charta.(c) But it has been held, that locks may be erected by the King's license. The plaintiff had erected, with such license, six sluices or locks on the river Ouse, in his own land, for the better raising and heightening the water, so that boats might the more easily pass though the locks; and a certain toll was granted to him in consideration thereof. A verdict having been found against the defendant, in assumpsit for these tolls, he moved to arrest the judgment, because the River Ouse was a common river; and it was therefore, incompetent to make stops upon it, or to take any sums of money for a passage though the locks. But the Court said, that the locks were upon the plaintiff's own lands, and made at his cost, for enabling vessels of burden to pass along the river, and besides, in this case, the defendant had promised to pay the toll for which \*the action had been [\*198] brought, and judgment was therefore given for the plaintiff.(d) And ancient weirs, or *locks*, have been respected by the Legislature. Thus, in an act for the preservation of fish, it is declared, that nothing therein contained shall extend to any ancient weirs or locks upon any rivers; but that the proprietors or owners may repair, maintain, rebuild, remove, or take down, any of those weirs or locks, as they might have done had the act not been made.(e)

A wharf, also, may become an obstruction to public navigation; and

tecting themselves; in this case the commissioners could not apply the rates until Parliament had sanctioned the procuring of the water.\*

(z) Chap. XVI. (a) 2 Inst. 30. (b) Ch. 5, s. 2. 2 Inst. 30.

(c) 13 Mod. 615, Rex v. Clark. Supposing a fishery to have reverted to the Crown by the dissolution of a corporation, whether it can be regranted? Quare. 7 Q. B. 339, Mayor, &c. of Colchester v. Brooke.

(d) Cro. Car. 132, Juxon v. Thornhill.

(e) 1 G. 1, st. 2, c. 18, s. 18. See st. 6 & 7 W. 3, c. 16, s. 1.

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\* 19 L. J., Canc. 197, Att. Gen. v. Andrews.

if so, it is decidedly illegal. The defendants were indicted for a nuisance, in erecting a wharf on the Thames, to the injury of the navigation of the river. The Corporation of London were conservators of the river, and had let a space of ground at Milbank to Lord Grosvenor, one of the defendants, upon certain considerations: amongst others, for a fine of 400*l.*, for the purpose of erecting a wharf there. It had been made between high and low water mark, and extended for a considerable space along the river. There had formerly been a recess there, between two projections. It was shewn, on the part of the prosecution, that this recess had, in the former state of the river, afforded a place of refuge in stormy weather, and that the eddy water which it produced had been very convenient for the passage of watermen. The defendants contended, that the Corporation had a right to make the erection in question, being conservators of the river, and that they had a power, by statute,<sup>(f)</sup> to build and let wharfs, provided they did not interfere with the navigation of the river. But Lord C. J. Abbott inquired, whether it was meant to be contended that the defendants had a right to narrow the Thames, so long as they left a space sufficient for the purposes of navigation. The learned Chief Justice said, that the defendant could derive no protection from the Corporation; for although they might have a right to the soil, they had no power to take a fine legally from any one who might make an erection for the benefit of the public. And if the erection were a nuisance, no protection could be conferred by a body which received a pecuniary remuneration for permitting the erection. The defendants, upon this, proceeded to give evidence that the erection of the wharf had been an advantage instead of a nuisance; and that the recess itself had been formerly a nuisance; and that the acts which had been done were beneficial generally to the stream. In summing up to the jury, the Lord Chief Justice observed, that in order to be exonerated from \*re-  
[\*199]  
sponsibility, it is incumbent on a party who meditates an alteration in the high-way, or other subject matter of public right, to proceed by inquiry before the sheriff. If there be a neglect in so doing, it lies on the party to shew that his change has not been detrimental to the public. Now, the question at issue was, whether the public convenience had been affected or diminished by this alteration. The public had a right to all the convenience of the former state of the river, unless some degree of benefit were afforded by the change. It had been said, that the benefits enjoyed before the erection of the wharf had been limited to particular times and seasons of the weather; but yet the public ought not to be deprived of these for the sake of an erection which were a matter of private convenience. The jury acquitted Lord Grosvenor, and found the other defendants guilty.<sup>(g)</sup> The question is, whether the wharf occasions any nuisance to the navigation of the river, not whether the creation of it be a benefit to the navigation in general.<sup>(h)</sup>

(f) 14 G. 3.

(g) 2 Stark. 511, *Rex v. Lord Grosvenor and others.*

(h) Car. & M. 496, *R. v. Randall.*

Yet, where the proceeding is not by indictment, but by action, great care is necessary in order to establish such a case of nuisance as will lead to damages. The plaintiff was the owner of the Globe Stairs Dock, and possessed an adjoining wharf and jetty. The wharf, and a great part of the jetty, were above high water mark. A vessel belonging to the defendant struck the jetty in her passage along the river, and carried away part of the wharf. Case being brought, the pleas were: 1. Not guilty. 2. That the plaintiff was not possessed *modo et forma*. 3. That the defendant had not the care, direction, management, or navigation of the vessel *modo et forma*. 4. That the jetty interfered with the defendant's navigation along the common public navigable river. The plaintiff had a verdict on the three first issues, and the defendant on the last; upon which the plaintiff moved for a rule to enter a verdict for him upon that issue also, on the ground that the plea had not been sufficiently proved, and likewise for judgment on the whole record non obstante veredicto. The Court were of opinion, that the plea had been proved, but, notwithstanding, they gave judgment for the plaintiff, by reason of the invalidity of the plea itself. For when a party is passing along a highway, he can only interfere with an obstruction as far as is necessary to exercise his right of passage. The obstruction must, therefore, do him a special injury in order to warrant its being abated by him. Here the defendant had failed to shew in his plea that there was a necessity for him to navigate the ship over that part of the river where the nuisance was. He did not [\*200] shew that such part of the river was his right course, and that it would have been inconvenient and difficult to have taken any other course by which the nuisance might have been avoided. His statement that "he had occasion to pass with the ship over the said part of the bed and course of the said river," would be true, if he had to take her up and down the river, although there might have been ample space for conveniently doing so without coming in contact with the nuisance. And it was too late for the defendant to contend that the plea amounted only to not guilty, and would have been bad on special demurrer. The plaintiff consequently had judgment. (i)

A floating dock in a public river is a nuisance, although beneficial for repairing ships. (k)

So the mooring of barges in an inconvenient manner across a public creek has been deemed an obstruction. The plaintiff brought an action on the case against the defendant for so doing, whereby the public navigable creek and the channel were obstructed, so that the plaintiff was obliged

(i) 19 L. J., Q. B. 453, *Dimes v. Petley*. It must be confessed, that there seems to be a stringency in this determination of the Court. It is difficult to say where the line of obstruction is to be arrested, if too much latitude is allowed to purpresture. It is true that the decision was embarrassed by a point of pleading, but still the judgment proceeded upon a principle. And it may perhaps be a question for consideration, whether an individual, as a member of the public, may not be entitled to suppress an obstruction on the highway, be it sea or land, although there may be room enough for him to have a convenient passage without meddling with the encroachment. If he meddle improvidently, it must be at his peril.

(k) 1 Russ. Cr. & M. 379, *Anon.* 1 Hawk. c. 75, s. 11.



to carry his goods overland, at a great expense. After a general verdict in his favour, errors were assigned, that the supposed obstructions were in the nature of a common nuisance to all the subjects of the realm, and not a particular or private injury to the plaintiff, and that the plaintiff had brought an action, whereas the only remedy for such a grievance was by a criminal prosecution only. But the Court affirmed the judgment. It appeared to them, that a particular damage had been sustained by the plaintiff in this case; he had been compelled to unload and carry his goods overland, and so had incurred expense through the act of the defendant.<sup>(1)</sup> The Court were quite clear upon the subject, Lord Ellenborough saying, "If a man's time or his money are of any value, it seems to me that the plaintiff has shown a particular damage."<sup>(m)</sup> And by Dampier, J.: "If this be not a particular damage, I scarcely know what is."<sup>(n)</sup>

\*Clearly, if the mooring be done with regard to the convenience of the public, it is not illegal. Thus, the plaintiff brought trespass for cutting a rope belonging to his barge, by which the rope was spoiled, and the barge set adrift; The defendant said in reply, that he was possessed of a wharf, and that the rope was wrongfully and injuriously fastened to it without his leave and license, wherefore, &c. The plaintiff then replied the following custom: that all the King's subjects sailing, rowing, and passing with their barges upon the said river, at low water, have been used to moor their barges, and to keep them so moored, to the wharfs along the river until high water, leaving sufficient room for all persons to pass and repass, and that the plaintiff did the same at the defendant's wharf in pursuance of his right. The custom was proved to a certain extent, and the jury found a special verdict, namely, that "the custom of mooring barges at low water, is for one side at the piles in the front of the wharf, and if there are no piles, the custom does not allow the barges to moor, at the wharf, unless through distress."<sup>(o)</sup>

We have already seen, that the throwing of ballast into havens, roads, and channels, is prohibited by statute.<sup>(p)</sup> It should be added, that the provisions of the acts apply also to navigable rivers.<sup>(q)</sup> The Court have been careful not to suffer this salutary statute to be evaded. There was a special verdict from the Northumberland assizes, in which this method of obstruction came to be considered. The plaintiff had brought an action of trespass for taking an anchor. The verdict found that the plaintiff was master of a ship floating in the River Tyne, which was a navigable river; that certain ballast was unloaded out of the ship into a machine, called a *kopper*, with intent that it should be carried into the sea; that it was accordingly so carried, and cast out of the hopper, where the water was more than fourteen

(1) 4 M. & S. 101, *Rose v. Miles* and others. It is cited in the Report as *Rose and others v. Miles*.

(m) Id. 104.

(n) Ibid.

(o) 1 Esp. 252, *Wyat v. Thompson*.

(p) See ante, p. 186.

(q) 19 G. 2 c. 22. 24 & 25 H. 8, c. 9, s. 6.

fathoms deep, and at a distance from any port, &c. The verdict also found the information, summons, and conviction of the plaintiff before the defendant, who was a justice of the peace. The question was, whether, as the act directs that ballast should be cast *upon the land only*, this conviction was proper. And the Court was of opinion that it was a right conviction, for the express words of the statute forbade the plaintiff from throwing his ballast any where *but* upon the land. If it had been put upon the hopper in order to carry it upon the land, or if it had been shifted from one ship to another, without an intention to drop it anywhere, these would not be cases within the act, for there would not be a casting or throwing out [202] contrary to its provisions. \*But here was an intent to place this lumber in the water, and there was no security as to the place where the hopper might drop it; it would, indeed, be the interest of the person who carries it in the hopper to drop it as soon as possible, in order that he might come to fetch more. Judgment was given for the defendant, and in support of the conviction.(r)

The same prohibitions which were enacted in the last mentioned statute, against leaving ships in a ruinous condition which have been run on shore or sunk or stranded, are also applicable to navigable rivers. But it has been held that no *indictment* will lie for not removing a vessel under such circumstances. The defendant was charged by the Corporation of London for a nuisance on the River Thames, by allowing his ship, which had been run down and sunk by an outward-bound Indiaman, to remain there. It was alleged in the indictment, that the navigation of the river had thereby been obstructed. These facts were opened by the counsel for the prosecution, and also that the ship was a complete wreck at the time. Lord Kenyon then expressed his opinion, that the indictment could not be sustained, for the grievance had not been occasioned by any default or wilful misconduct of the defendant, but by accident and misfortune, and that it would be adding to the calamity to subject the party to an indictment for what had proceeded from such causes, against which he could not guard. Upon being pressed, the learned Chief Justice observed, that the expense of removing the vessel might have amounted to more than the whole value of the property, and he directed an acquittal.(s) Nevertheless, it is necessary to place a buoy over a vessel which has been sunk, and for a default in so doing an action on the case will lie. As where the defendant's lighter had been sunk in the Thames, and for want of a buoy the plaintiff's barge struck against it, and was greatly damaged. The facts were that no buoy had been placed until two or three days after the vessel had been sunk, that a watchmen had been directed to remain near the spot, and to warn all vessels approaching of their danger, that the barge in question came for the purpose of mooring there, and that the watchman desired the people on board to keep off, but that they disregarded the admonition, and that the barge accordingly sustained the

(r) 2 Burr. 656, Brucklesbank v. Smith, Esq. S. C. 2 Lord Keny. 358. See also Andr. 137, Rex v. Haddock.

(s) 2 Esp. 675, Rex v. Watts.

damage complained of. It was insisted for the defendant, that he could not be liable after the express warning which had been given, and that no particular form of notice was necessary in such a case. But Lord Ellenborough laid down a different doctrine: his lordship said, that it was a peremptory \*law of navigation, to place a buoy over any substance sunk in a navigable river so as to create danger, that [\*203] such was the proper and specific notice, which all understood and were bound to attend to. A verbal communication, as in the present case, would be likely to create confusion and mischief. There was a verdict for the plaintiff.(t)

Notwithstanding this case, and the decided opinion of Lord Ellenborough, that the duty of placing a buoy is incumbent on the owner or master of a sunken vessel, it seems by no means to follow that the buoy must be continually on the spot of the accident, nor that the rule is so universal as not to allow of exception. At all events, the declarations must shew some reasonable ground for requiring such a buoy. A declaration stated the sinking of a barge, and that it so lay under the water, as that other vessels would necessarily strike against it, of which the defendant had notice: and that *thereupon* it became and it was the duty of the defendant, whilst the barge remained so sunk, to give notice by a buoy or other signal, and the breach assigned was, that no such notice had been given. The Court held the declaration bad. The opinion of the Court was, that no sufficient obligation had been disclosed on the record. They would not agree that the word "*thereupon*" signified a necessary consequence from the premises that the buoy should be put down, but said it only referred to the time or occasion upon which the plaintiff's proposition was averred to have taken place. And, after all, this was an averment of matter of law, for there were no facts to warrant the conclusion. "*Thereupon*" was not to be considered as "*afterwards*," but as meaning "*thereby*." There was no continuing possession or control shewn on the part of the defendant, and the possession of the defendant when the sinking took place was held insufficient. The defendant's plea, that a sufficient time had not elapsed to remove the barge, was also held bad upon special demurrer, as affording no answer to the declaration if such plea were proved, but the faultiness of the declaration prevented this mistake from affecting the defendant's case. Nor would the defendant be liable to an indictment.(u)

The following case may be subjoined here as an example of a sufficient obligation on the record. In case the plaintiff declared, that the defendant was possessed of a wharf for loading and unloading vessels on the banks of the Thames; that near to the wharf certain wood work was placed by the defendant at the bottom of the river, over which wood work a ship or vessel \*would float only at certain states of the tide; [\*204] that the plaintiff was possessed of a ship or vessel which was at

(t) 1 Campb. 515, Harmond v. Pearson.

(u) 5 C. B. 599. 17 L. J., C. P. 227, Brown and others v. Mallet.

and alongside the wharf with the defendant's license, and for reward paid to the defendant; that the defendant had the management and control of the wharf, and of the mooring and stationing ships and vessels whilst they were using the wharf. And the plaintiff then assigned, that the defendant so unskilfully and negligently moored and stationed the plaintiff's ship or vessel in that part of the river over the said wood work, that it was greatly injured. The plea denied the management and control, and mooring and stationing, *modo et forma*. The verdict was for the plaintiff; and the Court refused a rule for arresting the judgment. Error was brought, but the Court said, that the duty on the part of the defendant to moor and station the plaintiff's ship safely was well alleged, and the breach well stated. (v)

So the building of a quay may operate as an obstruction. On an application for an injunction to stop the building of a quay in the River Mersey, the Lord Chancellor directed an issue to try whether it was an injury to the port and harbour of Liverpool, observing, that it was not his intention to direct any trial, whether this was an injury to the navigation on the Mersey, because it was his opinion that the tide-way of a river in the shallowest part of it could not be interrupted by buildings of that sort, unless there had been an antecedent execution of a writ of *ad quod damnum* by a jury. (w)

The placing of beams and spars in a public navigable river, is of itself no nuisance. But it may be a nuisance to do so. At all events, a plaintiff can sue for a particular damage done to himself by such an act; and the allegation that certain beams and spars were so placed as to prevent the rightful access to his house, is a sufficient disclosure of special damage. (x)

And by 46 Geo. 3, c. 153, s. 1, before any river, quay, wharf, jetty, breast, or embankment shall be made, constructed, or erected in or adjoining to any public harbour, or any river immediately communicating therewith, so far as the tide flows up the same, one month's notice must be given to the Admiralty, under a penalty of 200*l*. The second section saves the privileges of the City of London.

[\*205] \*So oyster beds may be a nuisance. And it is no excuse to say, that a vessel was aground, for the liberty of passage is not suspended because the tide is low. Still, no unnecessary damage can be done; therefore, if, through unskilfulness, an oyster fishery be damaged, when it might have been avoided, the party injuring it is liable to an action. Case was brought for damaging a fishery of oysters and oyster beds by unskilful management. There were two counts. The pleas were, 1. Not guilty to both; 2. A common navigable river, and that

(v) 15 Mees. & W. 626, *Wood v. Curling*. 16 Mees. & W. 628, *Curling v. Wood*, in error. 17 L. J., Exch. 301.

(w) 6 B. & C. 579, *The Attorney General v. Brittain*; cited there as *M.S.*

(x) 5 Man. & Gr. 613. 6 Scott, New E. 645. 3 Dowl. N. S. 61, *Rose v. Groves*.

the oyster beds were obstructing the navigation. There were other similar pleas. The verdict on the first count was for the defendant on not guilty; on the second count for the plaintiff on not guilty, damages 5*l*. The issue as to the nuisance was found for the defendant. The Court said, that a navigable river must be considered to be open at all times. No unreasonable user can be alleged, even although a want of skill might induce compensation. Artificial beds of oysters, likewise, may be a nuisance, as well as natural beds. Therefore they would not grant the plaintiff a new trial. The plaintiff then moved for judgment *non obstante verdicto*; because some of the defendant's pleas were bad. The Court said, that some were bad, but some were good; and the material issue, as to the nuisance, was with the defendant, so that they would not give judgment for the plaintiff *non obstante verdicto*. The verdict was correct in fact, though on immaterial issues. The defendant then impeached the issues found for the plaintiff; but, as we have seen in the Chapter on Fisheries,<sup>(y)</sup> he was unsuccessful in this, although he kept the main points of the verdict.<sup>(z)</sup>

After these illustrations of obstructions, it can be no matter of surprise to find that the diversion of a public river without authority for so doing is an offence against the law. Thus, one M. was fined 200*l*. for diverting part of the River Thames, by which he had weakened the current of the river for carrying barges towards London. For such a thing, it was said, could not be done without an *ad quod damnum*, the river being a public highway.<sup>(a)</sup>

Sometimes, however, it is declared, by the authority of Parliament, that certain acts shall not be deemed obstructions, which otherwise might be considered such. Thus, by the Highway Act, the surveyor is empowered, for the purpose of getting materials to repair the road, to search for, dig, get, and carry away the same in any waste land or common ground, river, or brook, within the parish for which he shall [206] be surveyor, or within any other parish where materials are likely to be found, in case sufficient materials cannot be had within his own parish, so that he do not divert or interrupt the course of such river or brook, or get the same out of any river or brook within the distance of one hundred and fifty feet above or below any bridge, nor within the like distance of any dam or weir.<sup>(b)</sup> So, by the general Turnpike Act, the surveyor to the trustees is authorized to search for, dig, gather, take, and carry away any materials for making or repairing any turnpike road; out of any common river or brook (not being within fifty yards of any bridge, dam, weir, or jetty,) without being deemed a trespasser.<sup>(c)</sup> Both these acts, however, require that care shall be taken to prevent any damage or impediment to navigation. For it is declared, that if in the prosecution of the above purposes, the surveyor make any pit or hole in

(y) Ante, Chap. V. p. 133.

(z) 7 Q. B. 339, *Mayor, &c. of Colchester v. Brook*.

(a) Noy. Rep. 103, *Hind v. Manfield*. 1 Hawk. 199, c. 75, s. 11, cites S. C., S. P. 10 Rep. 141. The case of the Isle of Ely, F. N. B. 225.

(b) 5 & 6 W. 4, c. 50, s. 51.

(c) 3 G. 4, c. 126, s. 97.

the rivers or brooks, he shall forthwith cause it to be fenced off, and shall cause the fence to be supported and repaired whilst the pit continues open, and if no materials be found, shall cause it, within three days after the opening to be filled up. If materials be found, he must cause such pit or hole to be filled up within fourteen days after a sufficient quantity has been obtained, or to be sloped down and fenced off, if required by the owner of the land or ground, and so continued. A forfeiture of ten shillings is ordained for every default. If, however, the surveyor receive notice from a justice, or from the owner or occupier of such river or brook, and shall neglect to fence off the pit or hole, or fill it up, or slope it down, as the case may be, for six days after the receipt of such notice, upon proof of such notice upon oath at a special sessions he shall forfeit a sum not exceeding 10*l.*, to be laid out and applied in fencing off, filling up, and sloping down such pit or hole, and towards the repair of the roads of the parish where such offence has been committed, in such manner as the justices shall direct.<sup>(d)</sup> And every surveyor shall, within twenty-one days after his appointment, cause all open pits and holes, not likely to be further useful, to be filled up or sloped down in manner aforesaid, if likely to be further useful, he shall secure the same by posts and rails, or other fences, to prevent accidents to persons or cattle. By the Turnpike Act, a penalty of twenty shillings, instead of ten shillings in the Highway Act, is awarded for the defaults above mentioned.<sup>(e)</sup>

An omission to cleanse a river will subject the defender to an indictment; \*and, therefore, such a neglect may be virtually classed [\*207] amongst obstructions. Thus, it is laid down, that if one have a river, and for want of scouring it the neighbouring land be overflowed, the party is indictable for his nonfeasance.<sup>(f)</sup> The difficulty, however, upon these occasions has been to fix the individuals liable to the repair. For sometimes the responsibility of this duty lies upon persons by virtue of a prescription, and, occasionally, it may become binding by reason of some consideration. But the common principle seems to be, that those who have the advantage of the easement, are bound to maintain the river properly where it is enjoyed. It was so taken in very early times. Then a commission was awarded to certain persons that they might inquire concerning the stoppage of a river, and by whom the offence had been created. The inquest found, that it had been stopped because no one had used it since the last pestilence, and that it had not been cleansed from time immemorial, nor was any one in particular under an obligation to keep it clean. But it was found, that A. had the lordship on the one side of the stream, and B. on the other, and that these persons had rights of fishery there, and, moreover, that the inhabitants of four villis had a passage along the river as an easement. Presentment being made in the King's Bench, there went forth a writ to distrain A. and B., and also the four villis, upon A. and B. contended, that they ought not to be charged, because it had been found, that no one in particular was bound to cleanse;

<sup>(d)</sup> 5 & 6 W. 4, c. 50, s. 55. 3 G. 4, c. 126, s. 99.

<sup>(f)</sup> 12 Mod. 510, in *Rex v. Wharton*.

<sup>(e)</sup> 3 G. 4, c. 126, s. 99.

and they also insisted, that the vills were chargeable by reason of their case and passage. By Green, C. J. It is quite clear, that if these inhabitants had not their rights of passage along the river, A. and B., who possessed the piscary, would have been bound to the entire reparation of the river. The four vills had judgment to abate the nuisance.(g)

This case is recognised by Lord Coke, who likens the repair of a common river to that of a street, and adds, that he who has land adjoining to the stream, is not bound to cleanse, unless he have the benefit of it, as a toll, fishing, or other profit.(h) Parties doing repairs by virtue of an act of Parliament, must comply with and limit their acts within the provisions of the statute. The plaintiff was the owner of a sole and separate fishery in the Avon, and the defendants were proprietors of the navigation of that river. They built a new wharf on their own ground adjoining to the bed of the river; and in order to render it of practicable access to loaded barges, \*they dug a new canal in the bed of the [\*208] river, and took away some gravel. The navigation of the river might have been carried on without the new channel. The Court held, that the act of the defendants was not within the meaning of the statute; that they were only authorized to repair what the owners were formerly bound to do. And the Court held, moreover, that *prima facie*, the owner of a piscary should be considered to be the owner of the soil.(i) However, where trustees were entrusted by an act of Parliament with the improvement of the navigation of the river Parrett, and were empowered to take tolls thereon, it was held, that they were not liable to clear away weeds, nor undertake the drainage of the river. For there was no express enactment to that effect, and the weeds, though injurious to the neighbouring lands, were no detriment to the navigation.(k)

Before we close this part of our subject, it is desirable to mention another principle which has been recognised in the Courts of law respecting these supposed obstructions and encroachments. And it is, that if the thing complained of (whether it be an erection of any kind, or other fancied hindrance to navigation) be in reality a public benefit, it shall not be considered as an obstruction, nor punishable as such, unless it actually amount to a nuisance. But if the erection in question do in fact amount to a nuisance, it is no answer to say that a resulting public benefit has counterbalanced the nuisance. So that an embankment projecting into a navigable river was held to be a nuisance, although a great public advantage was produced by facilitating the landing of passengers and goods, by launching boats in foul weather, and affording protection to small boats in certain states of the wind.(l) Whether a building be a

(g) 37 Ass. pl. 10.

(h) 13 Rep. 33. See 1 Hawk. c. 75, s. 13; and see upon this subject also the case of Syson v. Johnson, 8 B. & C. 795; and see Woolrych of Sewers.

(i) 2 Chit. Rep. 658. Partheriche v. Mason and another.

(k) 10 Mees. & Wels. 593, Parrett Navigation Company v. Robins. S. C. 3 Railw. Cas. 383.

(l) 4 Ad. & El. 384, R. v. Ward. S. C. 6 Nev. & M. 38.

nuisance or not, is a question very fit, according to the opinion of Lord Hale, to be determined by a jury; <sup>(m)</sup> and it results, therefore, that it is not every erection in a port or navigable river which can be called a nuisance, merely because it infringes on the water way. <sup>(n)</sup>

It will be shewn hereafter, that no length of time will legitimate a public nuisance, so that the acquiescence of twenty years on the part of the public in an interruption of their rights, occasioned by the illegal act of an individual, will not divest these rights, nor prevent the community <sup>[\*209]</sup> from proceeding \*to abate or remedy the nuisance under which they may chance to suffer. And this leads us to consider the remedies which may be adopted for the redress of grievances connected with the obstruction of navigation, either upon the high seas, or on public rivers.

The Attorney General had filed an information against the mayor and commonalty of Plymouth, stating that the King was seised in fee, in right of his crown of England, of the port, haven, and arm of the sea, called Sutton Pool, that the said pool ought not, for the sake of safe navigation, to be encroached upon; but that the defendant had intruded, and had built upon the soil theretofore at full sea covered with water, and within high water mark of said pool, where ships had anchored, to the prejudice of the port, and damage of the King. The information further prayed, that the ancient bounds of the port might be ascertained, and that the king might have possession of all buildings erected within them, and might provide for the preservation of the port, and cause such buildings as were nuisances to be removed. The defendants denied that the buildings were nuisances, but admitted that they were within high water mark, and they made title to the soil of the pool. There were two questions in the case before the Court: first, whether the buildings were nuisances; and, secondly, whether the soil between high and low water marks were or not the inheritance of the King. A trial at bar was ordered as to the right of soil, and a commission was awarded concerning the nuisance, to inquire of the following articles. First, the ancient full sea mark; next, what buildings had been made upon any part of the shore within the ancient full sea mark; and, lastly, to find out and certify whether the "houses, wharfs, quays, yards, or gardens, or any of them, made, enclosed, or enlarged, in or upon any part of the shore within high water mark, were a nuisance to the Port of Plymouth or not; and which of them, and how much of them, or any of them, and wherein, and in what manner." <sup>(o)</sup> Had the Court been of the opinion, that these encroachments upon the water way were a nuisance, they would not have directed the commission, because the defendant having admitted the encroachment, the inquiry would have been superfluous. <sup>(p)</sup>

<sup>(m)</sup> De Port Maris, 85.

<sup>(n)</sup> 6 B. & C. 571, by Counsel arg.

<sup>(o)</sup> The Sutton Pool case, in the Court of Exchequer, cited Wightw. 208. 6 B. & C. 572.

<sup>(p)</sup> By Counsel arg. Id. 573.



Again, an information of nuisance and intrusion had been filed by the Attorney General against certain owners of wharfs in Portsmouth Harbour. It was proved by the witnesses for the Crown, that the wharfs projected into the water way; and, according to the opinions of some engineers, they were nuisances to the port and navigation. The defendant admitted the encroachment, but contended that no such injury had been effected; and the authority of Lord Hale was mentioned on their behalf, namely, that the question of nuisance should be determined by the jury. The Court, being of that opinion, left all the evidence to the jury, who acquitted the defendant (q)

All these cases came under consideration upon an indictment for a nuisance in the River Tyne. The complaint against the defendants was, that they had kept and continued certain geers, spouts, piles, posts, wagon ways, railways, platforms, and erections, over the river to a great extent, towards the middle of the stream, so that the navigation had been much straitened, obstructed, and blocked up. There were other counts, some of which charged the defendants with keeping and continuing chains and anchors fixed to certain buoys in the navigable part of the river, others with permitting vessels without lawful excuse to remain in the river near a certain staith belonging to the defendants to the obstruction of the navigation; and for casting coals into the river with the same mischievous effect. The defendants pleaded not guilty. It appeared upon the trial that the defendants were the owners and occupiers of a coal mine at Wallsend, on the north side of the river. They had caused two staiths to be erected, for the purpose of shipping their coals. (r) It was shewn, that when ships are not laden at staiths, the coals are at first taken on board of small craft called keels, and cast by hand from the keels into the ships. Thus having a keel on either side, the ships occupy a greater space on the river than when they are laden by means of the staiths and drops, and their cargoes cannot be put on board in less than double the time. The expense is greater, and the condition of the coals worse than when shipped at staiths. There was evidence also, that the staiths, which were the subject of the indictment, occasioned, at particular times of the tide, a considerable obstruction to the small craft navigating against the stream; and that they occupied, for some time before and after high water, a considerable space, which would otherwise be navigable by large vessels. If there were no staiths, the number of keels used on the Tyne would be greatly increased; and the river would be very much crowded by them. At the south side of the river [211] and opposite to one of the staiths in question, there was a sand bank; and it appeared in evidence, that after the erection was made, the bank had increased, in consequence of the change thereby produced in the cur-

(q) The Attorney General v. —, in Plymouth, cor. Gibbs, C. B., cited 6 B. & C. 573.

(r) "These erections consist of piles, (technically termed geers,) driven into the bed of the river, on the top of which a platform and railway are laid: the coal wagons pass along this railway, and at the end are lowered by means of a machine called a drop, into the hold of the vessel." 4 B. & C. 568.

rent of the water. The Corporation of Newcastle are conservators of the River Tyne and Port of Newcastle, and gave leave to the defendants to erect the staiths, *but no writ of ad quod damnum had been sued out.*

The question in this case arose almost entirely from the summing up of the learned Judge. He said, that the use of a navigable river was not for passage only, but for other important rights, which might supersede the right of passage. When a great public benefit ensued from that which occasioned the abridgment of the right of passage, such an abridgment was not a nuisance, but proper and beneficial; and the jury thought that such a benefit had occurred upon this occasion, they were bound to acquit the defendants. The following questions were, in fact, submitted to their notice :—

Were the staiths erected in a reasonable place?

Was there a reasonable space left for the public navigating in the Tyne?

Were the staiths a public benefit?

Did the public benefit countervail the prejudice done to individuals?

In consequence of this direction, the jury said they found the defendants not guilty. A rule was then obtained for entering a verdict of guilty, or for a new trial. It was urged for the prosecution, upon the discussion of the rule, that the plea of not guilty had put the fact of obstruction by the defendants, and that only, in issue; and the simple question for the consideration of the jury should have been, whether the party accused had, or had not, occasioned the obstruction, as alleged in the indictment. It was also very strongly insisted, that no writ of *ad quod damnum* had been sued out. Two learned Judges<sup>(s)</sup> held, that the direction at the trial was right; the Lord Chief Justice<sup>(t)</sup> was of a contrary opinion, although upon the main point, whether the staiths were a nuisance or not, he gave "no opinion"; the other Judge,<sup>(u)</sup> having [\*212] been consulted in the case when at the Bar, did not pronounce any judgment. Holroyd, J., instanced several public rights on the river which sustained an obstruction, without the existence of any nuisance to occasion the obstruction, such as those of fishing, anchorage, &c. Those rights sometimes yield and become subordinate to others. The public, (that is, each individual,) have not a right to navigate every part of the river, but only where there is not a pre-occupation by others. Ships which lie at wharfs, or elsewhere in the river or port, are, or are not, a nuisance, according to circumstances. And Lord Hale points this out as a question for the jury. Then it appeared that the loading, by means of geers, or staiths, was a benefit, instead of an injury to the navigation,

(s) Bayley, J., and Holroyd, J. Bayley, J., had tried the cause.

(t) Lord Tenterden.

(u) Littledale, J.

and thus could not be a subject for indictment. Then with regard to the want of an *ad quod damnum* writ, the case could not be likened to that of shutting up a public highway, for that clearly cannot be done in the ordinary manner without such a writ. The question here was, whether the mode of enjoyment of some of the public rights of the port, river, or navigation, were a nuisance. To be sure such as acted without the writ did so at their peril, and the want of it might be a fair ground for the Lord Chancellor to interfere by injunction; but if the manner of enjoyment be not a nuisance, it cannot become so for want of that writ. The learned Judge then commented on the direction of Mr. Justice Bayley, considering it sufficiently qualified to have warranted the jury in coming to a reasonable verdict, which the Court would not disturb. Bayley, J., adhered to the manner of summing up, and to the doctrine on the subject of nuisance, which he had entertained at the trial. The learned Judge said, that the London purchaser obtained from these two staiths six hundred cargoes of coals, above one hundred thousand chaldrons, in an unbroken state, instead of an inferior condition, as keel coals would be. There would thus be a public benefit, even to the distant market; but when the question is considered with reference to the state of the Port of Newcastle, inasmuch as there are twenty-eight similar staiths, for the private purposes of particular coal owners, the necessity of taking into consideration the effect upon the distant market appears more prominent. For there must be staiths for the loading even of keel coal. And if you exclude a ship staith, must you not also hold the keel staith to be a nuisance? Though in a less degree, it will interfere with the freedom of passage; and will, although of less magnitude, be still a nuisance.

The Lord Chief Justice admitted, that 'he want of a writ of \**ad quod damnum* was not conclusive against the defendants. But [\*213] he considered the sanction of such a writ to be highly proper, and that a prudent man could hardly venture to act on his own judgment without it. Indeed, the want of it, furnishes a ground of argument against the propriety of his act, because it shews that he is apprehensive of the result of inquiry. And in the absence of such a proceeding, Lord Tenterden added, that the jury who try an indictment for nuisance, have a right to exercise their own judgment, in the same manner as they might if such a previous inquiry had taken place. His Lordship then, after observing that he thought there was considerable doubt whether the public were more benefitted than the owners of the staiths, because in the market the best coals would always fetch the best price, and that it was clear that some obstruction had been occasioned to the navigation, went on to say, that the true question raised by the indictment had been, whether the navigation and passage of vessels had been injured by the erections. Upon this question there was evidence on both sides, regard being had to that obstruction which must necessarily take place, by the transfer of coals from keels, or other vessels, confined to the navigation of the river, into ships of a different kind passing to sea. Had the question been left entirely in that form, and a verdict been found for the defendants, probably no objection could have been made. But the Lord

Chief Justice considered, that any observations respecting the public benefit were not compatible with the case as charged in the indictment.

There being two opinions to one against a new trial, the rule was discharged.(v)

The defendants, the owners of the soil adjoining a harbour, were indicted for a nuisance. A special verdict was found, that the harbour was in extreme cases, rendered less secure by the defendant's works. It did not distinctly appear, that the nuisance, which consisted of planks, was erected in the harbour, but assuming it to have been so, the Court held that such slight consequences could not amount to a nuisance.(w)

But a floating dock in a public river had previously been held to be a nuisance, although beneficial for repairing ships.(x)

It need hardly be added, that a temporary obstruction, occasioned by proper repairs of a haven, or other public station \*of a similar [214] nature, cannot be called such a hindrance as to be followed by punishment. So far from this, a custom to contribute towards the repairs of a haven has been recognised in the Court of Chancery. It is called the custom of *Landcheap*, claimed by the Corporation of Malden. It is this; that every person purchasing an estate of inheritance of, or in any freehold lands or tenements holden of the manor, shall pay according to the immemorial custom, to the lord of the manor or lordship for the time being, for every mark of money, being the price of every such purchase, for such lands and tenements so holden and purchased, 10*d.* of lawful money of England. The Vice Chancellor said, on affirming the custom, that a bill would lie before the right was tried at law, where the parties were numerous; but that when such a right was in dispute between two lords of manors, it must be tried first at law.(y)

So the building of a temporary bridge by a railway company, who are empowered to erect a permanent bridge, is not an obstruction, a sufficient waterway being left in conformity with the act of Parliament.(z)

Even the exercise of a right of fishery may be, under certain circumstances, an obstruction to navigation; and we have accordingly seen, that a defendant was justified in mooring his ship against a rock, although the plaintiff was thereby prevented from taking so many fish as he would otherwise have done, because the right of fishery must be subservient to the purposes of navigation.(a)

(v) 6 B. & C. 566, *Rex v. Russell* and others.

(w) 6 Ad. & El. 143, *R. v. Tindall*. S. C. 1 Nev. & P. 719.

(x) 1 Russ. C. M. Anon.

(y) 4 Madd. 447, the Mayor, &c. of Malden v. Coates. 3 Keb. 532, *Bugby v. Hall*, where the same custom was held good. See 1 Lord Raym. 386.

(z) 4 Y. & Col. 63, *Priestley v. Manchester and Leeds Railway Company*. S. C. 2 Railw. Ca. 134.

(a) 1 Camp. 517, *n. Anon*, ante, p. 166.

The remedies which may be pursued for obstruction to public navigation are, indictments, informations, presentments at the sessions, or court leets, occasionally actions, and an abatement of the nuisance, if done consistently with the preservation of the public peace. And sometimes, says Lord Hale a special commission as in the case of the River Lee.<sup>(b)</sup> An injunction may also be applied for to a Court of equity.

The remedy by indictment is so well known, that it is unnecessary to enlarge further upon that subject. It is a course open to all his Majesty's subjects, and differs therein from the process by information, in which latter case application must be made to the Court, unless the Attorney-general file one *ex officio*. The Court, too, upon some occasions, will refuse to grant the \*information prayed for. As where an information was moved for upon allegations of a continued obstruction of two arches of a bridge at Leeds over the River Aire, and of the obstruction of a third arch, so that the course of the river was greatly straitened. It however, appeared, that no application had been made to the party to abate it, that it had been begun fourteen years since, and had consequently, been so long acquiesced in; and the Court therefore, refused the motion. Had a bill been preferred before the grand jury at the assizes, and had they refused to find it, the Court might have been induced to adopt a different course, and to grant the application.<sup>(c)</sup> But, in general, if there be a proper case disclosed, this mode of proceeding may be adopted under the sanction of the Court. As where the defendant was prosecuted by information, for cutting down the banks of the River Wye, whereby the watercourse was inverted. In this case it appeared, that the part of the river in which the offence had been committed, was vested in particular persons by an act of Parliament, and that an action had been given to parties grieved; and it was, therefore, objected that the action would not lie. But the Court were of a contrary opinion, after hearing several precedents of cases, where both an indictment and action had been held maintainable.<sup>(d)</sup> So where a party erected locks on the River Thames, to the great hindrance of navigation.<sup>(e)</sup> And the information may be prosecuted in equity without the intervention of a jury, and a decree had to abate it. As in the case of the nuisance of Portsmouth Harbour, next to Gosport, by erecting wharfs and other buildings, between high and low water marks, so as to obstruct navigation there. It was said, in that case, for the defendant, that the question ought to be decided by a jury; and that Lord Hale had expressly declared that nuisance was a question of fact, and not of law,<sup>(f)</sup> and so that an issue ought to be directed. But the Court said, that the doctrine laid down by Lord Hale might apply very well where the question was of nuisance only, and the evidence doubtful. That learned Judge, however, had clearly shewn, that where the King proves a right to the soil, he may have a decree to abate any nuisance. And there

<sup>(b)</sup> De Jure Maris, p. 9.

<sup>(c)</sup> 1 Lord Keny, 379, Rex. v. Green.

<sup>(e)</sup> 12 Mod. 615, Rex. v. Clark.

<sup>(d)</sup> 2 Show. 30, Rex v. Stanton.

<sup>(f)</sup> De Port. Maris, p. 85.

was consequently, a decree made, that these buildings should be abated.(g)

[\*216] A canal was carried across a river and the adjoining valley by \*means of an aqueduct and an embankment, in which were several arches and culverts, which fell into the river above its point of intersection with the canal, and at times of flood the water then penned back into the brook, overflowed its banks, and was carried by the natural level of the country to the above mentioned arches, and through them to the river, doing, however, much mischief to the lands over which it passed. Except for the nuisance after mentioned, the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage of the country, which had increased the body of water.

The defendants, occupiers of lands adjoining the river and brook, had, for the protection of their lands, subsequently to the working of the canal, aqueduct, and embankment, erected or heightened certain artificial banks, called fenders, on their respective properties, so as to prevent the flood water from escaping as above-mentioned, and the water had consequently, at time of flood, come down in so large a body against the aqueduct and canal bank, as to endanger them and obstruct the navigation. The fenders were not unnecessarily high, and if reduced, many hundred acres would again be inundated. It was held, that the defendants were not justified, under these circumstances, in altering the course of the flood water, and that the indictment will lay. The jury found, that the acts creating the nuisance were done by the defendants *severally*; nevertheless as the nuisance was the result of all these acts jointly, the defendants were considered to have been rightly joined in one indictment which stated the acts to have been *several*.(h) Upon this decision, error was brought in the Exchequer Chamber, and the Court held, that the jury ought to have found,—1st, whether the raising of these fenders was an ancient and rightful usage, or whether it had commenced since the construction of the canal; 2ndly, whether the course described by the special verdict to have been taken by the flood water was or was not the ancient and rightful course; and, thirdly, whether the raising of the fenders to their present height had become necessary in consequence of the construction of the aqueduct. A venire de nova was awarded.(i)

In Scotland the matter is arranged thus. The proprietors of land on the bank of a river having begun to erect a mound, which, according to the report of an engineer, would have the effect of throwing the ordinary flood stream on the lands on the opposite bank, were restrained by per-

(g) 2 Anst. 603, the Attorney General v. Richards. S. C. 1 Dow. 316, nom. Parmeter v. Attorney General. S. P. 10 Price, 378, Attorney General v. Parmeter. Id. 350, Att. General v. Burridge.

(h) 1 B. & Adol. 8, R. v. Trafford.

(i) 8 Bing. 204, Trafford v. The King. S. C. 2 Cr. & J. 265.

petual interdict from \*the further erection of any bulwark, or any other open manifestation, which might have the effect of divert- [\*217]  
ing the stream of the river in times as flood from its accustomed course, and throwing the same upon the lands opposite.(k)

The law is the same with regard to purpresture. An information stated, that the Crown was seised of the River Thames, &c., and that the defendants had lately encroached upon the King's soil, and had thereby rendered it less convenient for shipping. It was prayed, that the encroachment might be declared a purpresture, and abated at such. The defendants set up as a defence, that they had the leave of the High Admiral, and denied the encroachment. The Court, however, were clear that purprestures should be abated, and they directed a commission to inquire whether the fact complained of was a purpresture. The commission returned in the affirmative, and the encroachment was abated.(l)

The punishments for creating or setting up obstructions of the nature alluded to above, are fine and imprisonment. And thus the defendant, in the case cited from Noy, was fined 200*l.* for diverting the course of the Thames.(m) The removal of the nuisance, however, will, upon confession of the party, be a great mitigation of the fine; and, in such a case, affidavits should be tendered to the Court, for the purpose of lessening the offence.(n)

But locks, banks, &c., may become a public benefit instead of a hindrance, and in that case very serious punishments are denounced on such as maliciously injure them. It is, in effect, as much an obstruction to pull down such erections, when legally and beneficially enjoyed by the public, as it would be to set them up in places where their presence might hinder the course of navigation. It is therefore declared by the Malicious Injuries' Act, that if any person shall unlawfully and maliciously break down or cut down any sand bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, floodgate, or other work, on any navigable river or canal, every such offender shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, \*or for any term not less than seven years, or to be imprisoned for any term not exceeding four years: and, if a [\*218]  
male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition to such imprisonment; and if any person shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials, fixed in the ground and used for securing

(k) 3 Bligh. 414, Menzies App. The Earl of Breadlebane, Resp.

(l) 2 Anstr. 607, Attorney General v. Philpot. S. P. City of Bristol v. Morgan, cited in Hale de Port. Maris. p. 81. 2 Anstr. 607. S. P. Town of Newcastle v. Johnson, relating to towage on the Tyne, cited 2 Anstr. 608. Acc. 5 B. & A. 308, per Bayley, J.

(m) Noy. 103.

(n) 6 Mod. 145.

any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, or shall unlawfully and maliciously open or draw up any flood-gate, or do any other injury or mischief to any navigable river or canal, with intent, so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly whipped (if the Court shall so think fit,) in addition to such imprisonment.(o)

Upon the principle of a case, where it was decided, that a person who had sustained special damage in consequence of the obstruction of a highway, whereby his journey had been delayed, might recover in an action,(p) it may be presumed, that a similar remedy would lie for one who might be aggrieved by such a hindrance in a public stream. If the injury happen upon the main sea, or near the coasts, so as it be not within any county jurisdiction, the Admiralty will take cognizance of the offence; but if it occur *infra corpus comitatus*, the Courts of common law will interpose their authority. And thus, a suggestion that the thing complained has taken place in the River Thames, in the body of the county of Kent, are deemed sufficient to induce the Court to grant a prohibition; and where it appears that the Admiralty has proceeded in a cause over which it possesses no jurisdiction, the Court will not impose any terms upon granting the rule.(q)

Where the act constituting a canal company declared, that it should be lawful for them to weigh up sunken vessels within a certain time, and keep the same until the expenses were paid, it was held that these words were compulsory, and that the company were rightly used for neglect.(r) It was alleged, on another occasion, that the defendant had wrongfully placed certain planks and logs in a river, so as to obstruct the navigation, [\*219] \*so that the plaintiff had to convey his goods, &c., by a longer and less convenient route. This was held to be a sufficient cause of action. But it is not so to allege a like damage to a reversionary interest, the obstruction being caused to the plaintiff's tenants, and no act affecting the reversionary interest being disclosed. The verdict having been entered generally, the judgment was arrested, and the plaintiff cannot have judgment at all upon such an occasion, if the jury negative special damage.(s)

But a bond given to a private person, conditioned to remove a public nuisance, could not be sustained upon demurrer, or upon a writ of error,

(o) 7 & 8 G. 4, c. 30, s. 12.

(p) 2 Bing. 263, *Greasley v. Codling*. See p. 199, *ante* *Dimes v. Petley*.

(q) 3 T. R. 315, *Velthasen v. Ormsley*, overruling *Salk. 548*, *Wharton v. Pits.*

(r) 11 Ad. & El. 223, *Parnaby v. Lancaster Canal Company*. S. C. 3 Nev. & P. 523.

(s) 16 L. J., Q. B. 233, *Dobson v. Blackmore*. 9 Q. B. 991. S. C.



because this offence is punishable in another way. However, where the defendant pleaded performance to an action upon such a bond, and issue was joined thereon, Lord Kenyon said, that the plaintiff must have a verdict. It was further held, that to satisfy such a plea, the nuisance in question must have been entirely removed, and, therefore, the lowering of certain cribs for fishing, from ten to six feet, did not amount to such a performance as the plea alleged.(t)

Then, lastly, parties aggrieved by obstructions may proceed by abatement, in order to maintain the due exercise of their public rights.

This authority is more particularly given to commissioners of sewers, who are empowered by statute,(u) to survey walls ditches, banks, gutters, sewers, gates, calcies, bridges, streams, and other defences, by the coasts of the sea, and marshy ground lying within the limits of counties. And also the common passages for ships, &c., in the rivers, streams, and other floods, within the limits of counties, which may have become damaged, by means of setting up, erecting, and making streams, mills, bridges, ponds, fishgarths, mill dams, locks, hebbling wears, keeks, and flood gates, or other like lets, impediments, and annoyances. These walls, &c. may be made, corrected, repaired, amended, put down, or reformed, according to the discretion of the commissioners. But the power does not extend to mills, mill stanks, or causeys erected before the time of King Edward I., unless they have been raised beyond their former altitude, and so made more prejudicial; in which case they are not to be thrown down or overturned, but reformed by the abatement of the excess and enhancement only.(v)(w)

\*We have said, that an injunction may be asked to restrain obstructions. Thus, the Attorney General filed an information [\*220] and bill for a perpetual injunction to restrain the defendants from choaking up the bed of the Thames at Milbank, and from doing other damage there, or that they might be restrained until the trial of an indictment against them. The Vice Chancellor having refused the motion, the application was renewed before the Lord Chancellor, who thought that under the circumstances, an injunction ought to issue in the first instance, until answer or further order. The relator subsequently filed a supplemental information and bill, and the defendants then moved to dissolve the injunction, on affidavits that the course that had been pursued would be beneficial instead of injurious to the navigation; but the Lord Chancellor considered, that matters ought to remain as they were, until the indictment had been tried. There had not been any previous writ of *ad quod damnum*. All the defendants were afterwards found guilty upon the indictment, and the proposed alterations were abandoned.(x)

(t) Peake, Add. Cas. 155, *Fallowes v. Taylor*.

(u) 23 H. 8, c. 5, the Bill of Sewers.

(v) 10 Rep. 138. 13 Rep. 36.

(w) For a more detailed account of the jurisdiction of these commissioners, and of the mode of executing the authority delegated, see Woolrych of Sewers.

(x) 2 Wils. Ch. Ca. 87, *Attorney General v. Johnson*. See, with reference to the removal of obstructions in rivers in Ireland, of embankments, &c., 1 & 2 W. 4, c. 57. 5 & 6 Vict. c. 105.

So, although a specific order to repair the banks of a canal, stop gates, &c., was refused, an injunction was granted restraining the defendant from hindering the plaintiff's navigation by continuing the banks out of repair, and thus the effect of the above order was obtained.(y)

In former parts of this work we have spoken at large upon the mode of issuing rights of public and private fishery; our intention here is to point out what the law deems to be obstructions of those rights, and also the remedies for such interruptions. Injuries may be committed against public rights of fishing in various ways, as by throwing nets across a river to the hindrance of persons engaged in fishing, by erecting weirs whereby fish cannot escape, by taking fish at improper and unseasonable times, &c.

Thus with respect to nets, it is ordained, that the standing of nets and engines called trinks, and all other nets, which are or may be fastened and hanged continually, day and night, by a certain time in the year, to great posts, boats, and anchors, overthwart the River of Thames, and other rivers of the realm, which standing is a cause of as great and more destruction of the brood and fry of fish, and disturbance of the common passage of vessels, as be the weirs, kydels, or any other engines, \*be [221] wholly defended for ever. Every person setting or fastening them to such posts, &c., continually, to stand as is aforesaid, and being duly convicted, shall forfeit 100s. for each offence. Provided, however, that the possession of such trinks, if they be of assize, may fish with them in all seasonable times, drawing and pulling them by hand, as other fishers do with other nets, and not fastening or tacking the said nets to posts, &c. as aforesaid. Saving to every subject also his right, title, and inheritance in his fishing in the said water.(z) The remedy under this statute is by indictment or information, but the statute having given no express jurisdiction to the sessions, an indictment at Cumberland Sessions for fastening nets across the River Eden was quashed upon objection, the matter charged being a newly created offence.(a)

In an information upon this statute, the word *continually* having been left out, the question was, whether the statute had been complied with. The defendants were charged with having set and fastened nets, called trinks, in the River Thames, to boats, day and night, *for so long time as the tide did serve*. It was resolved, that the information was good, for the nets could not stand but for so long as the tide served; and the word *continually* should be taken to mean, continually so long as they may stand to take fish, and as the time of fishing may endure, whether in the day or night, for *lex non intendit aliquid impossibile*.(b)

(y) 10 Ves. Jun. 192, *Lane v. Newdigate*.

(z) 2 H. 6, c. 15.

(a) 2 Str. 1256, *R. v. James and others*.

(b) 12 Rep. 89, *Fishing in the River Thames*. Whether a weir, which did not destroy the fry of fish, nor impede navigation, and which had existed immemorially, was an illegal work within this statute of Hen. 6, was made a question. 3 Dougl. 307, *Robson v. Robinson*.

Another, and comparatively, a recent statute, has included the improper use of nets amongst a great variety of injuries to the salmon fisheries. It is declared, that whoever shall take, kill, &c., or endeavour to take, &c., pursue, hurt, or injure any salmon or salmon kind, by laying or using any hot lime or filth, or material or drug pernicious to fish, or using any water in which any green lint or flax has been steeped, or letting off stagnated water, or any water impregnated with any material or drug pernicious to fish; or if any person shall use or employ any such means as aforesaid, or use any fire or light, or white object, or lay down any kind of net, engine, or device, or wilfully do or commit, or cause, &c., any act, in any river, water, rivulet, stream, mill dam, mill sluice, cut, pool, or pond communicating therewith, for the destruction of the brood, spawn, \*or small fry of salmon, therein (angling excepted); or if any [222] person shall make, erect, &c., any bank, dam, hedge, or stank, or net, or place any fire, light, or any white object, so that the young fry or salmon be prevented from going down from such rivers, &c., he shall forfeit a sum not exceeding 10*l.*, nor less than 5*l.*; and for a second or subsequent offence, a sum not exceeding 15*l.*, nor less than 10*l.* The penalty is to be at the discretion of the justice before whom the offender shall be committed, and he shall, moreover, forfeit all the fish, spawn, &c., and all the nets, &c., or things used in the taking thereof.(c)

Wears which disturb the proper exercise of public fishing are also prohibited. The setting up of new wears along the sea shore, has been already mentioned; and we have also shewn, that in the Severn and other rivers, such obstructions are equally unjustifiable.

It is moreover ordained, that justices of peace, being the conservators of the Thames, and of other rivers within the realm, shall survey and search all the wears in such rivers, that they shall not be very straight for the destruction of the fry and brood of fish, but of reasonable wideness, after the old assize used or accustomed, 17 Rich. 2, c. 9.

Indeed the erection of wears, so as to injure the fish, is a public nuisance, it is in itself illegal, and against the rules of the common law; and no length of time will legitimate or sanction the continuance of such an obstruction. The following case, which arose concerning a fishery in the River Ribble, deserves to be mentioned here, although the injury complained of was alleged to have been done to a several fishery, inasmuch as the decision proceeded upon public grounds. The defence, in fact, made to an action upon the case for damaging the plaintiff's fishery, amounted to a justification of a public nuisance. The plaintiff's complaint was, that the defendants had wrongfully continued a wear or dam across the river, lower down the stream than the plaintiff's fisheries, by which salmon and other fish were prevented from coming to the fisheries, and spawning there. It appeared at the trial, that till about forty years since, the defendant and the prior owners of a certain mill had always possessed a

(c) 58 G. 3, c. 43, s. 3.

*brushwood* wear across the river, near the mill. The defendant shewed, by the production of old deeds, that he had a right to a wear for the convenience of his fishery, and that the right expressed therein was not limited as to the height, nor restricted as to the materials of the wear. However, no \*witness could remember any other than a brushwood wear prior to 1766, which was about forty years before the action. At that time a solid stone wear was erected two-thirds across the river, in lieu of the former brushwood wear; but the remaining third of the brushwood was left. No objection appears to have been made to this. But in 1784 the remainder of the brushwood was taken away, and the stone wear carried quite across the river. The new weir was a solid piece of masonry, but was not broader nor higher than the brushwood, making an allowance for the sinking of the latter. The action was brought within three months before the expiration of twenty years from the last alteration. The jury found for the defendant, stating, that they thought the change of the wear in 1784 prejudicial to the plaintiff's fishery, but that the defendant's right was, in their opinion, established by length of possession and other evidence of title. A motion being made to set aside this verdict, Lord Ellenborough declared, that it could not be sustained, for the stone wear was plainly an encroachment. The learned Chief Justice observed, that weirs had been considered from the earliest times to be public nuisances, that the public had an interest in the suppression of such nuisances, and that even had the action not been commenced within the twenty years, as is before mentioned, the public would not have been concluded, although an acquiescence for twenty years might bind parties, whose rights, were merely private. Now, in this case, there had always been an escape for the fish over the brushwood wear, and it was not competent for the defendant to erect an impervious wall of stone, through which the fish could not insinuate themselves, (as they may through a brushwood wear), and over which, except in extraordinary times of flood, it was in evidence that the fish could not pass. The rule was, consequently, made absolute.(d)

Other injuries to public fisheries may be by illegally taking the fish at unseasonable times of the year, by using nets of improper dimensions, &c.; but the reader will recollect, that we have already entered upon these subjects at length in a prior Chapter on Fisheries, as well as in that upon User.(e)

It should be remarked here, that the government has afforded many facilities to public fishing. Some of these have been already attended to in that part of our work which treats of \*British fisheries.(f) Let us add to these the privilege of exemption from impressment. By 50 Geo. 3, c. 108, s. 2, it is enacted, that certain persons employed in the fisheries of Great Britain, should be free from impressment. I.

(d) 7 East, 195, *Weld v. Hornby*, Clerk. S. C. 3 Smith, 244. For pulling down piles and fishgarths in the Rivers Ouse and Humber. See 23 H. 8, c. 18.

(e) See ante, Chap. V. and VIII.

(f) Chap. V.

Every master having the care or conduct of any fishing vessel, or boat, employed as aforesaid, and who, or some owner of which vessel, &c., shall have, or within six calendar months before application for a protection shall have had one apprentice or more under sixteen, bound to him, or to such owner, for five years at least, and which apprentice shall actually serve, or have served in the business of a fisherman pursuant to his binding. II. Every such apprentice, provided that the number do not exceed eight, and the fishing vessel be of the burthen of fifty tons and upwards; or seven, if the vessel be of thirty-five tons burthen and upwards, but under fifty; or six, if the vessel be of thirty tons, and under thirty-five; or four, should such vessel be under the burthen of thirty tons. But to gain this exemption, the apprentice must be in the actual service of his master, or his representatives or assigns, in the business of a fisherman, and in no other service, and also until he shall have attained the age of twenty years. III. One mariner for every such vessel or boat of ten tons burthen or upwards, besides the master and apprentices, such mariner being employed to navigate or fish in such vessel, and actually continuing in the service of fishing. IV. Landmen above the age of eighteen, and under thirty, who shall enter on board such fishing vessel or boat, of the burthen of ten tons or upwards, and shall be actually employed in navigating or fishing therein, for two years, to be computed from the time of their first going to sea, employed as aforesaid, and to the end of any fishing voyage they may then be engaged in, continuing and being truly employed in such service. The third section of the same statute provides, that an affidavit shall be made and sent to the Admiralty, describing the vessels, and persons to be protected, and then a separate protection shall be granted to each person, without fee or reward. The production of this protection shall be a ground for discharge by any commanding officer who may have the custody of such impressed person, taken contrary to the act. The fourth section provides a punishment for such as insist in impressing, or detaining an exempted person after the exhibition of his protection; or refuse to examine, or detain his protection, whether the offender be the commanding officer of the press-gang, or the captain of one of his Majesty's ships, unless it be in the case of an actual invasion, or imminent danger thereof. Should the protection be taken away by any one from the party so impressed, an affidavit may be made before a justice, that the protection was so granted, and [\*225] that it continued in force, and was taken away either at or after the time of the impressment. It shall be tendered to the captain, or other officer, having the command on board of the ship, and then, if the captain, &c., do not discharge the individual impressed, he shall be subject to the same penalty. This penalty in all the above cases is 20*l.* to be paid to the party impressed, if not an apprentice, or if an apprentice, to his master, and to be recovered and levied by distress and sale. If the money be not paid, the offender may be impressed for any term not exceeding one month, in the house of correction, and kept to hard labour. (g) A mariner and apprentice, fishing off Heligoland, were held to be within the

provisions of this act. On the 1st of June, 1812, the *Adventure*, of the burthen of fifty tons, was in the North Sea, with a license to fish for lobsters at Heligoland. An officer of the *Musquito* came on board, and impressed the two men in question, who were brought up by a writ of *habeas corpora*, for the purpose of being discharged. The words of the preamble spoke of the deep seas beyond the coasts. It was contended, that lobsters, were a species of fish only to be found in shoals amongst rocks, and that they were not caught by boats which fished in deep waters, so that the impressed men could not be said to come within the act. But the Court made the rule absolute for their discharge, since the act must be taken to mean all such fisheries, within the neighbourhood of these kingdoms, as contribute to the better supply of our markets with fresh fish. All who are engaged in such fisheries, under certain limitations, are within the policy of the act.<sup>(h)</sup>

A mariner, on board of a fishing smack, had a protection granted to him by the board of Admiralty, upon the application of the master of the vessel, under the statute 50 Geo. 3, c. 108. By some accident the vessel sailed before the protection reached him, and on the 6th of January he was impressed, the circumstances being mentioned to the impressing officer at the time, and the protection being then in force. The Court directed that he should be discharged; for, although the impressing officer was warranted in taking the man at the time, he not having his protection with him, yet as it turned out that he really had a protection under the act, the Court were bound to give effect to it. There was another point, namely, that this person being a mariner, and the statute allowing but one mariner to each smack, that there were more mariners [226] on board when he was impressed. The Court said, however, that the protection afforded could not be abrogated by the act of the master in taking others on board, and the rule was made absolute for his discharge.<sup>(i)</sup>

It had previously been declared by an act for encouraging the Greenland fisheries, that no harpooner, line manager, or boat steerer in that trade, should be impressed. Such persons, when unemployed, may sail in the colliery trade, upon giving security to return in the next season; and common seamen are protected from the 1st of January till after the end of the then next season for the fishery, and until the completion of the voyage home.<sup>(k)</sup> It is observable, that the word "apprentices" is not mentioned in this section; nevertheless, a writ of *habeas corpus* was issued for the purpose of discharging an apprentice in the Greenland fishery on that ground only; and on a motion to quash the writ *quia improvide emanavit*, Lord Ellenborough said, that the several provisions against impressing particular descriptions of seamen in the Greenland

(A) 1 M. & S. 223, Samuel Payne and John Throughgood's case.

(i) 16 East, 167, Pratt's case.

(k) 26 G. 3, c. 41, s. 7.

fishery, without naming apprentices, shewed that the Legislature meant to leave this exemption upon the general law of 18 Geo. 2. c. 17.(*l*)(*m*).

Moreover, it is declared by 2 & 3 Ed. 6, c. 6, that, inasmuch as great complaints had been made of exactions by officers of the Admiralty, from merchants and fishermen adventuring into Iceland, Newfoundland, Ireland, and other places commodious for the getting of fish, neither the admiral, not any officer, or minister, &c. of the Admiralty, shall exact, either for himself, or his servants, any sum of money, &c., for any license to pass the realm to the said voyages, nor upon any respect concerning such voyages. The forfeiture is double the value of the thing taken; to be sued for by the party grieved,\* or any other person by information, bill, &c., the King to have one, and the party complaining the other moiety. No esson, &c. to be allowed. For the second offence, the party offending shall lose his office in the admiralty, and make fine and ransom at the King's pleasure.

Seamen, who agree to embark on fishing voyages, are held strictly to their agreements. Thus, it is declared, that if any seaman, or marine, after he shall have entered into any agreement \*or taken any earnest for the performance of any fishing voyage, or for any stipulated term of any fishing season, shall neglect or refuse to proceed on the intended voyage, he shall forfeit 5*l*., and may be apprehended upon a warrant from a justice on a complaint made; and if he shall not pay the penalty, he shall be sent to the house of correction, and be kept to hard labour for any term not exceeding thirty, nor less than fourteen days.(*n*) And if any master, or owner, of any ship, vessel, or boat, shall hire, entice, harbour, entertain, or employ in any such ship, &c., any apprentice, seaman, or landman, belonging to any fishing vessel, or boat, or who shall have engaged to join any fishing voyage, knowing such apprentice to belong to the fishing vessels, &c., or after notice thereof, he shall, on conviction (before a justice) forfeit 20*l*.(*o*)

On the other hand, if any master, or owner, of any fishing ship, &c., shall knowingly harbour, &c., in any such fishing ship, &c., any seaman, or landman, who shall have deserted from his Majesty's service, every such master or owner, shall, on conviction (before a justice) forfeit, 20*l*., to be levied by distress.(*p*)

The chief remedies for obstructions and injuries to public fisheries, appear to be by indictment, or information by quo warranto, and by abatement. Summary remedies are also given by various acts of Parliament;

(*l*) That statute exempts persons under eighteen, and those who, not having before used the sea, shall bind themselves apprentices to serve at sea, during the first three years of such apprenticeship. The individual in question was more than eighteen, and been bound for more than three years.

(*m*) 6 East, 238. Ex parte Brooke.

(*n*) 50 G. 3, c. 108, s. 5.

(*o*) Sect. 6. To be levied by distress, and in default thereof the punishment to be one month's imprisonment, with hard labour. Sect. 7.

(*p*) 2 G. 3, c. 15, s. 25.

for instance by proceedings before a magistrate, actions to recover penalties, &c. These statutory provisions have already been, for the most part, alluded to in former pages.

Where, however, it is either thought inadvisable to proceed summarily, or in cases where this speedy mode of punishment will not apply, the course fit to pursue is most frequently by indictment. We have seen, that by the statute of Westminster the second, c. 47, it was forbidden to take salmon at certain periods of the year, and that certain punishments were awarded for disobeying that act; <sup>(q)</sup> but no summary mode of conviction was in use at that period. Lord Coke, therefore, says, that the offender ought to be proceeded against by indictment at the suit of the King, and that punishment cannot be inflicted upon the delinquent before due conviction. <sup>(r)</sup> So again, the remedy under the statute of Henry VI., for throwing nets across a \*river so as to obstruct the [228] fishery, seems to be by indictment, or information; and an indictment will lie at common law against such as violently obstruct parties in the exercise of their public rights. Care, however must be taken not to frame an indictment for disobedience to a statute, unless it be clear that such a proceeding can be sustained, for another kind of remedy is not infrequently prescribed (as in the statute of 3 Jac. I., for the preservation of sea fish) <sup>(s)</sup>, and the prosecutors would in such case, fail in their object.

Another mode of redress is by a writ of quo warranto. Thus, where one claimed to have a several fishery in the River Ex, by a grant from the Crown, Lord Chief Justice Holt, said, that a subject had a right to fish in all navigable rivers, as well as to fish in the sea, and that a quo warranto ought to be brought to try the title of the grantee, and the validity of his grant. <sup>(t)</sup> This kind of fishery is called a *free* fishery, and and is by them considered to be a royal franchise. <sup>(u)</sup> According to those who maintain this opinion, that the free fishery differs from the several fishery, because he who has the latter must be or at least, must derive his right from, the owner of the soil. <sup>(v)</sup> They would, therefore, consider the several fishery mentioned in the above case, to be a free fishery.

Upon the general principle, that the public have a right to remove obstructions which impede the enjoyment of their common privileges, it seems that illegal obstructions, as nets, wears, &c., (being such as the law will not sanction), may be abated, provided there be no breach of the public peace. Sometimes also, the law requires an abatement of nuisances by the authority of justices of the peace. As in the case of setting up banks, dams, hedges, or stanks, or nets across the Rivers Severn, Dee, &c., so as to prevent salmon from coming up to spawn. In this case, the justice shall order the nets, &c., to be cut and destroyed in

<sup>(q)</sup> Ante, p. 105.

<sup>(r)</sup> 2 Inst. 479.

<sup>(s)</sup> Ante, p. 159.

<sup>(t)</sup> 1 Salk. 357, Warren v. Matthews.

<sup>(u)</sup> See 2 Comm. 39.

<sup>(v)</sup> Ibid, and see ante, Chap. V.



his presence, and shall cause the banks, &c., to be demolished, and removed at the charge of the offender, to be levied in the like manner with the other penalties awarded against him by the statute.(w)

The jurisdiction before which these offences are to be determined, will be now shortly mentioned. It was enacted, by the 18 Ed. 1, c. 47, that good overseers of that statute, and by \*13 R. 2, c. 19, that good and sufficient conservators of the statute [concerning the [\*229] taking of salmon] should be assigned and sworn, for the purpose of punishing offences. Another act, passed in the reign of Richard II., explains who the conservators are. It was ordained, that the justices of the peace of all the counties in England should be conservators, and survey offences and defaults against the statute, and also survey and search all the weirs in such rivers. Under-conservators are to be appointed by the same justices, who are to inquire at their sessions, as well by their office as at the information of the under-conservators, of all trespasses, &c., and cause the parties indicted to come before them, and fine and imprison such offenders, if convicted, at their discretion. If the under-conservator have given information, he shall have one-half of the fine. The jurisdiction of the Lord Mayor of London is then defined, as we have before written.(x) Another statute enabled the Lord High Admiral, and all conservators of rivers, lords of leets, and justices of peace, together with justices of oyer and terminer, and Judges of assize, to hear and determine these offences. But the summary powers given by the different statutes above referred to, have much superseded these general jurisdictions; and where such summary proceedings cannot be instituted under general statutes, the peculiar jurisdictions of local authorities are most frequently available to supply the deficiency.

It is important, however, that we should attend for a few moments to the act for the more effectual preservation and improvement of the fishery in the Thames, because the dominion of the Mayor and Aldermen of London, as conservators of that river, is fully defined by that statute.(y)

By sect. 1, the mayor, &c., may issue such rules respecting fishermen and dredgers in the Thames and Medway, as they shall see fit; that is to say, as to their demeaning themselves in fishing—with what nets, &c.—at what times they shall fish—for ascertaining the assize of the several fish to be taken—for the preservation of the fish—for obliging every common fisherman, &c., to have on his boat, vessel, or craft, both his Christian and surname, with the name of the parish or place of his residence, painted in large and legible characters, in a convenient place for reading the same—for preventing the changing, altering, or defacing of such marks of distinction—and for annexing reasonable forfeitures for the breach of their rules. The rules are to be approved of by the Lord Chancellor, or Lord Keeper, &c., the two Chief Justices, and Chief Baron, or

(w) 1 G. 1, st. 2, c. 18, s. 14.

(y) 30 G. 2, c. 21.

(x) 17 R. 2, c. 9. Ante/ p. 104.

[\*230] any two of them, \*who may allow the same; and for the doing thereof, no fee or reward shall be taken.(z) The rules are to be printed and published.(a) Further, for the better regulation of the fishery, the Court may summon certain, not exceeding twelve, fishermen, and examine them upon oath touching the fishery; and if any one shall neglect the summons so given by writing fourteen days previously, without lawful excuse, he shall forfeit forty shillings, to be levied by distress and sale, and the penalty is to be paid to the treasurer of Greenwich Hospital.(b)

The mayor, recorder, &c., and the justices of counties within their jurisdiction, may hear in a summary way any complaints touching improper fishing, &c.; and they are required, either upon view, or complaint made upon oath, within ten days after the commission of the offence, to issue a warrant under hand and seal, directed to the water bailiff, &c., or to such constable, &c., as the mayor, &c., shall see fit, commanding him or them to apprehend and bring the offender before the mayor, &c. The warrants are to be executed on the river, or on any shore adjoining; and the persons having the warrant may go on board of any boat, &c., for that purpose, or enter any house in the day time, with a peace officer, for the same end. If apprehended in the city or liberties, the offender shall be carried before the mayor, &c., or if without the city, before a justice of the county where the offender is taken. Witnesses are then to be summoned and examined on oath; and upon conviction, the offender shall pay the penalty imposed. And it is provided, that the warrant, or other act of the mayor, &c., or justice, or water bailiff, &c., (such parties, as last aforesaid, acting in obedience to the warrant), shall be as valid as if executed within the limits of their own city, county, or jurisdiction.(c) Witnesses neglecting to obey the summons, or refusing to be examined, without lawful excuses, shall forfeit the sum not exceeding 5*l.* nor less than 20*s.*, as the mayor, &c., shall direct, by warrant under his or their hands.(d)

If any of the assistants of the water bailiff, or any peace officer, shall refuse to execute the warrant, or otherwise omit the performance of his duty, he shall, upon conviction before the mayor, &c., or justice, forfeit [\*231] and lose a sum not exceeding \*5*l.*(e) And if the water bailiff, or any of his assistants, shall receive any sum by way of gratuity, to delay or hinder any prosecution, or compound for, or wilfully conceal any offence, he or they shall, on conviction by the oath of a witness, before the mayor, &c., forfeit the sum of 5*l.*(f)

(z) The 2nd Section, concerning the destruction of spawn, &c., has been mentioned, p. 90.

(a) Sect. 4.

(b) The 5th Section relates to the power of the water bailiff, which we have already adverted to, p. 69. And the 6th as well; for obstructing the said water bailiff, &c.

(c) Sect. 7.

(d) Sect. 8.

(e) Sect. 9.

(f) Sect. 10.

With regard to the forfeitures, they are, first, to be levied by distress and sale, in the usual manner, rendering the overplus. For want of distress, the offender is to be committed for three months, unless payment be sooner made. Half of the penalty to go to the informer, and half to Greenwich Hospital. An appeal, however, is given. If the supposed offender shall, within five days after the distress taken, enter into a recognizance, with two sureties, in 20*l*., before the magistrate who has convicted him, (the recognizance to be returned within fourteen days to the Court of the mayor and aldermen), that he will appear at some Court of the mayor and aldermen, to be holden within six weeks after the making of the recognizance, or at the next Court of Conservancy for the county where the offence was committed, and abide the order there to be made, he shall have his goods again. Then, upon a petition of appeal to the Court of the Mayor, &c., or of Conservancy, a time shall be appointed for the hearing and determining the matter, notice being first given, and witnesses summoned. The witnesses are to be examined upon oath, and the appeal determined; and the penalties may then be mitigated, or ratified; and the Court are further empowered to award such reasonable costs, to be paid by the appellant, if the conviction be confirmed, as they shall see fit. The recognizance, moreover, if forfeited, may be estreated into the Court of Exchequer.(g) The next section gives the form of conviction, which is to be written on parchment and sent to the Court to be filed.(h) The next section takes away the writ of *certiorari*.(i)

If any person against whom a warrant may have been issued as aforesaid, should, either before or after conviction, escape, or go into any other county, &c., out of the jurisdiction of the person granting the warrant, or if, being convicted, his goods should be in a different county from that in which the distress was granted, the mayor, &c., or justice of the place into which such person shall escape, or where the goods shall be, if after conviction, are required, upon proof made upon oath of the handwriting of the said mayor, &c., or justice granting such \*warrant, to indorse their names on the warrant; and the warrant, so indorsed, [\*232] shall be a sufficient authority to all peace officers to execute it in such other county, &c. The said mayor, &c., or justice, may then, upon the apprehension of the offender, hear and determine the complaint, as though it had arisen within their respective jurisdictions, or may direct the offender to be carried before the person who granted the warrant.(k)

All suits, &c. commenced or prosecuted for any thing done in pursuance of the act, must take place within six months next after the accruing of the cause of action, and the general issue may be pleaded, and the special matter given in evidence. If the plaintiff or prosecutor become nonsuit, or forbear prosecution, or discontinue, or if a verdict pass, or judgment be given against him upon demurrer, the defendant shall then recover double costs, and have the usual remedy at law for such costs.

(g) Sect. 11.

(h) Sect. 12.

(i) Sect. 13.

(k) Sect. 14.

The act shall be taken, moreover, to be a public act.<sup>(l)</sup> Another section provides, that as far as the act relates to justices of the peace, the 24 Geo. 2, c. 44, shall be construed to extend to the mayor, &c., and justice acting in the execution of this act. Therefore, no suit, &c., shall be commenced, nor any writ served against the water bailiff, &c., unless there be a month's notice duly served. The notice must contain the name and dwelling of the party bringing the action, together with the cause of complaint, and the name and place of abode of the attorney. Within one calendar month after this, tender of amends, may be made by the officer complained against. Then, should the same not be accepted, the defendant may plead the tender in bar, together with the general issue, or other plea, by leave of the Court. If the jury shall find the tender of amends to have been sufficient, there shall be a verdict for the defendant; and if the plaintiff become nonsuit, &c., the defendant shall have double costs. If the jury find that no such tender was made, or the amends tendered not sufficient, and shall also find against the defendant on the other pleas pleaded, the verdict shall be for the plaintiff, with such damages as may be thought proper.<sup>(m)</sup>

It is nevertheless declared, that nothing in this act shall be construed to make fishermen compellable to take out licenses, or to make any gratuities paid to the water bailiff, or other person, legal, or to compel any fisherman to appear before the lord mayor, &c., to enter his name in a [\*233] book, or to incapacitate \*such fisherman from keeping any number of boys in one boat, as he may think proper, any thing in 9 Ann. c. 26, or any other statute, notwithstanding.<sup>(n)</sup>

Several saving clauses are incorporated in this enactment; as, of the rights, &c., of the city of London; of the mayor, as conservator, as aforesaid; of the mayor, commonalty, and citizens; or of the mayor as conservator of the Thames and Medway. The mayor may also hear and determine by presentment and indictment, as conservator, all unlawful and undue fishing, and other offences contrary to the ordinances, and he may impose a fine, upon conviction, not exceeding the penalties prescribed by such ordinance. Such fines shall be applied and distributed in like manner as the penalties inflicted by the Court of Conservancy have so usually been. Provided, that no person be twice punished for the same offence.<sup>(o)</sup> The next saving clause is of the King's rights—those of all bodies politic and corporate—of the Court of Admiralty, and of all other Courts and persons, such as, all fines, forfeitures, penalties, amerciaments, and wreck of sea—of right due and payable, and all and every right of franchise, &c., together with the right of making inquiry and punishment of the aforesaid offences.<sup>(p)</sup> Again, the act shall not prejudice the admiralties or vice admiralties of Kent or Essex, or any piscaries or fishings belonging to the city of London, or other city or town corporate, or any lords of manors, owners, or occupiers of any rivers,

(l) Sect. 16.  
(o) Sect. 15.

(m) Sect. 17.

(n) Sect. 21. See 2 & 3 Ed. 6, c. 6.  
(p) Sect. 18.

creeks, &c., adjacent to or within any of the said limits, or the rights of any other person within such limits. (g) Lastly, the inhabitants of the following places being fishermen, are exempted from the operation of the act, and may exercise their trades of fishing and dredging, as though the act had not been made. The Cinque Ports or their members, the city of Rochester, Stroud, Chatham, Friendsbury, Gillingham, Milton, Queenborough, Lewisham, Whitstable, and the places adjacent. (r)

Bye-laws in restriction of trades are not favoured. This principle extends to the regulations of fishing companies made *inter se*. An oyster fishery had been carried on within the limits of the manor and royalty of Whitstable, by a company of free dredgers, called the Whitstable Company of Dredgers. The lord of the manor was accustomed to hold a Court there, called \*a Court of Dredging, where the fishermen and dredgermen constantly attended, pursuant to notice. Twelve [\*284] of the most sufficient freemen of the company were used to be sworn of the jury, and orders were made at the Court for regulating the company and oyster fishery, with fines and penalties for the breach of such orders. Amongst such orders and bye-laws, some had been made from time to time, for prohibiting the freemen from holding or using any other grounds for the catching of oysters, or from being in partnership with any other tenant or occupier of any other oyster grounds than those belonging to the manor and royalty. The fines and penalties, moreover, were directed to be *stopped and detained out of the money arising by the sale of the stint of oysters of such freemen offending.*

A bye-law was subsequently made, which gave rise to the present question. It was as follows:—"It is ordered, that if any freeman or free widow of this manor, royalty, company, or fishery of Whitstable, shall at any time or times hereafter, either by himself or herself, or jointly with any other person or persons, directly or indirectly, be engaged or concerned in the trade or business of sending oysters to the market of Billingsgate, or to any other market or markets, place or places, for sale from any oyster ground, or oyster grounds upon the Kentish shore, or any part thereof, other than the oyster grounds of the said manor, royalty, and fishery of Whitstable, such freeman or free widow so offending shall forfeit and pay, as a fine, for every such offence, the sum of ten pounds, to be applied to the use of this company; and in case such freeman or free widow shall refuse or neglect to pay the fine or sum of ten pounds to the water bailiff of the said manor and royalty, within the space of twenty-four hours next after the same shall have been duly demanded of such freeman or free widow, by such water bailiff, such freeman or free widow so neglecting or refusing, shall from thenceforth, and *until such fine be paid, be wholly excluded from all share of the profits to be made thereafter,* by or from the joint trade in oysters of the

(g) Sect. 19.

(r) Sect. 20. See also 9 Ann. c. 26, many provisions of which are superseded by this act; and see 30 Car. 2, c. 9, an act for the preservation of fishing in the River Severn.

freemen of this manor, royalty, and fishery; and such profits shall in the meantime be divided as if such freeman or free widow so neglecting or refusing, had wholly ceased to be a freeman or free widow of this manor, company, and fishery."

This Whitstable Company was incorporated by 33 Geo. 3, c. 42, which continued to the company, and gave to their successors all powers hitherto exercised.

The plaintiff in the action before he became a freeman of this company, [235] was and still continued to be a member of the \*Sea Salter Company, which during all that time held an oyster ground on the Kentish shore, and he had been concerned in sending oysters to Billingsgate Market for sale from such oyster ground, and the Whitstable Company were aware of these facts at the time they admitted the plaintiff amongst them. In consequence of the plaintiff thus belonging to another society, a fine of 5*l.* was demanded from him, which he refused to pay, and, consequently, the defendant, the treasurer of the company, withheld the sum of 5*l.*, which the plaintiff claimed to recover as his share of the stint or profits made by the joint trade in oysters of the freemen of the said manor, &c., in case the above order or bye-law should be deemed invalid.

Assumpsit was the form of action resorted to, and the general issue was pleaded. The Court held the bye-law bad, for this was a penalty upon a penalty. Had a bye-law prescribed a remedy by distress, it would have been invalid; but this was worse, for the company, not content with levying the fine, withheld all share of the profits till it should be paid. And it further appeared that no usage had been proved, so as to authorize the exercise of this bye-law. The effect, in short, of this rule, would be to mulct the party to the whole extent of his profits, supposing that he had not the means of paying the 10*l.* at the time. Judgment was given for the plaintiff.(s.)

And by Le Blanc, J. If the usage only authorizes the infliction of a penalty, and stops there, I am not aware of any case which shews that a bye-law may go further than the common law mode of recovering it by action.(t)

Obstructions and injuries to private fisheries may be committed in various ways. For some acts the offender becomes civilly responsible, for others he is rendered liable to be proceeded against criminally. We shall

(s) 2 M. & S. 53, *Adley v. Reeves*. 17 Ves. 304, *Adley v. Whitstable Company*. A mandamus had previously been applied for to restore the plaintiff to his office of a freeman, but without effect. 7 East, 353, *R. v. Free Fishers and Dredgers of Whitstable*. S. C. 3 Smith, 319.

(t) *Id.* 61. In Ireland there is a penalty for throwing injurious materials into rivers frequented by fish, or into any streams or watercourses flowing thereinto. 1 & 2 Vict. c. 76, s. 2.

endeavour to mention some of these grievances, and also to point out the remedies which may be had by the owner of the fishery.

It may be safely affirmed, that whatever illegally lessens the enjoyment of a fishery, is in some way or other the subject of "punishment, whether it be effected by nuisances, by trespass, by depredation, [\*236] or otherwise.

First, with respect to nuisances. A writ of quod permittat(u) prosterne was brought against a man and his wife, and their son, suggesting that K., the mother of the two first defendants, had built a house and a longain to the damage of the plaintiff's frank tenement. The complaint was, that the plaintiff had a messuage and two wears for fish into which the water of the Thames was accustomed to flow by means of a trench, and so to refresh the wears, and that the house above mentioned had been so constructed across the trench, as that it could not be cleansed. And, moreover, the longain had been placed so near the trench, as to destroy very many fish. And whereas the plaintiff had been used to let the house and wears for 100s. per annum, in consequence of this nuisance the annual value of the letting had sunk as low as 20s. The plaintiff had often requested K. in her lifetime to abate the grievance, and had urged the defendants to do so after the death of K. All objections to the writ being overruled, a view was granted.(v) In Roll's Abridgment this case is cited as an authority to shew that assise may be maintained against an heir, an alienee or a feoffee, if any one of such refuse to amend a grievance of the description above mentioned.(w)

So again, it has been said, that he who has the several piscary in a water, shall have an action on the case against him who erects a dye-house, or any other nuisance by which the profit of his fishing is injured.(x) So again, the causing a superfluity of water to drown or overflow a fishery, is a plain obstruction, and punishable by an action of trespass.(y) An action of trespass was brought in Ireland against the defendant, for wrongfully setting up certain cuts, wears, and traps, made of wood, lime and stones, upon a certain rock, or fall of water, called the salmon leap, in the river Bann, in the county of Londonderry, so that salmon, trout and other fish, which would have come from the sea and that part of the river which lay below the plaintiff's fishery, were hindered from so doing. The jury having found a special verdict, it was urged in the Court of Exchequer, and a judgment was given for the plaintiff by the opinion of the Chief and two other Barons against one. A writ of error was then brought in the Exchequer Chamber, where the judgment was affirmed; and the case was then carried up \*to the House of Lords in Ireland, where the judgment was again affirmed. Va- [\*237] rious arguments were urged for the plaintiff in error, as that it did not

(u) But this writ is abolished by 3 & 4 W. 4, c. 27, s. 36.

(v) 17 E. 3, 9, pl. 31.

(y) 1 Lord Raym. 274.

(w) 2 Ro. Ad. 142.

(x) 9 Rep. 59.

appear that the defendant had sustained any actual damages, that supposing the acquisition of the fish to be a benefit to him, the reversion of the fish was a benefit to the plaintiff in error, and the suffering them to pass out must be a damage to her, &c. It was said on the other side, that each proprietor of a fishery, was bound not to injure his neighbour, that here the plaintiff in error, the owner of the upper fishery, could not be warranted in diverting the stream, neither, on the other hand, could the owner of the lower fishery make such an alteration in the stream, the common medium of both fisheries, as to destroy the rights of the upper one. And the House of Lords were of the same opinion. For it was not competent to the plaintiff in error to alter the condition of the fishery, nor to obstruct the passage of fish from the sea into the plaintiff's fishery in any manner not essentially necessary to enable her to exercise her right of catching fish, in their passage up the river; and the judgment was consequently affirmed.(z)

And thus, again, if the lord of a manor throw any impediment in the way of his tenant's fishery, this is also an obstruction, whether it be by any erection which endamage the quality of the fishing, or by so unreasonable a draught of fish as materially to lessen the commonable privilege.

It would be impossible to mention all the specific grievances which may be committed in derogation of a right of this nature; the modes of redress are entitled to a more particular attention, because different injuries require different remedies, and it is of these that we next propose to treat.

The remedies for obstructions or injuries to private fisheries are, as we have intimated, of two sorts, civil and criminal; and upon some occasions the party may espouse his own cause by abating the grievance under which he suffers, or repossessing himself of the property which may have been taken from his fishery.

The civil remedy now that real writs are, for the most part, abolished, is, for the most part, an action to recover damages. Ejectment—trespass [\*238] —trover—the action upon the case, and in \*equity, a bill of peace, or an injunction under some emergencies, are the proceedings now resorted to.

Criminal proceedings are by indictment, or information, or summary convictions before justices of the peace.

However, trespass is the proper remedy for immediate injuries to a man's several or territorial fishery, that is to say, presuming the fishery to be attached to the soil.(a) And it seems that where the fishery is disunited from the soil, trespass will not lie, and is therefore the legiti-

(z) 3 Ridg. 267. *Hamilton v. Marquis of Donegall*, in error. In this case the Marquis was the original plaintiff and the owner of the upper fishery, and Lady Hamilton, the owner of the lower fishery, the defendant. For an injury of this kind an assise formerly lay, 46 Ass. pl. 9, F. N. B. 184.

(a) See Chap. V.



mate action for damage to a free fishery. It has been already suggested in the fifth Chapter, that a free fishery had been occasionally confounded in the old books with a several fishery; and if we find, therefore, that trespass had been entertained for disturbing a free fishing, it may be readily accounted for by understanding this privilege in question as having been in reality allied to the soil. Then, again, if a free right of this nature be held the same with a common, there is doubt but the action of trespass will not be the proper course to take. Thus, in an old case, where there was some dispute as to the meaning of a free fishery, the counsel on both sides seemed agreed that trespass could not be maintained for a commonable right; and one of them for the plaintiff denied that his claim was for a common, but he said, that he was entitled to a several piscary, which a man might have like several pasture in his own soil.(b)

So in trespass against the defendant for breaking the plaintiff's free fishery, and taking away one hundred trout, he pleaded not guilty, and there was a verdict for the plaintiff. It was then moved to arrest the judgment, because the plaintiff could not have such a property in a free fishery as to call the fish his own. It was said on the other side, that the verdict had helped the difficulty, but the Court were of a contrary opinion, and reversed the judgment.(c) But, on the contrary, where trespass was brought for taking one hundred eels in a several fishery, it was urged as an exception in arrest of judgment, that the declaration was bad, because a man could not have any property in the fish until they were taken, and reduced into possession. But the plaintiff answered, that the fish might be called his, being in a several piscary, for no other than he could take them. And the Court being of the same opinion, the plaintiff had judgment.(d)

\*Another considerable difficulty attending this action is the much discussed question of immediate or remote injuries. If the [239] former kind be complained of, trespass must be brought; if the latter, an action on the case. However, as the subject will be fully considered in the latter end of this Chapter, which treats of the remedies for obstructing watercourses, and where the authorities will be collected, the reader is referred thither for the information upon this point.

Further, it is worthy of remark, that this action of trespass may be sustained, although no fish be actually taken from the place in which the right or privilege is exercised. It was so said in an ancient case,(e) and the reason is, that for whatever injures the right of another, and would be evidence in future in favour of the wrong doer, an action may be maintained, without proof of any specific injury.(f) This position has been confirmed lately in the case of a several fishery. The plaintiff brought an action for a trespass in his several fishery, and it was given in evidence that the defendant had fished there, but that he had not taken any fish;

(b) 4 E. 3, 48. (c) 3 Mod. 97, *Upton v. Dawkin*. Comb. 11, S. C.

(d) Cro. Car. 553, *Child v. Greenhill*. Sir Wm. Jones, 440, S. C. Mar. 48, S. C.

(e) 11 H. 7, 20, by Wood. (f) 1 Wms. Saund. 346 (a), in the note.

and the declaration also was silent on the subject of taking the fish. The plaintiff obtained a verdict, but the Court of Common Pleas were moved to set it aside. They, however, refused a rule to shew cause, because the act of fishing was not merely an infringement of the plaintiff's right, but, if overlooked, would therefore have been evidence of use and exercise of the right by the defendant.(g)

After that which has been said, it is hardly necessary to say any thing concerning the action on the case for consequented injuries; it is a common and a very efficient remedy, and is too well known to need any further comment here.

Nearly allied to trespass, is the action of trover, and this mode of proceeding may be adopted under some circumstances. As where a trespasser invades a several fishery, that is to say, where there is an exclusive property, or where a person having a free or common piscary, has taken certain fish, which another improperly possesses himself of, and carries away.

It has been holden for a very long time, that an ejectment will not lie for a piscary. This incompetency to bring ejectment, of course respects the incorporeal right, because where "the soil is in question, any [\*240] fishery incident thereto will pass along with it. But the difficulty arises when the privilege is independent of the land. Ejectment was brought for the lease of a house and lands, and of a *free* fishery in the Trent, and amongst other things, it was moved, that ejectment lay not of a piscary, that it did not appear in what vill the piscary was, and that entire damages had been given. The plaintiff upon this released his damages totally, and his action as to the piscary, and then had judgment, the Court being doubtful upon the point of the fishery.(h) The matter was, however, determined in the next reign. Error was brought on a judgment in ejectment in the King's Bench in Ireland. The principal error assigned was, that ejectment had been allowed of a fishery in a river, and inasmuch as this claim was not only of a profit à prendre and not of any land, the Court reversed the judgment, saying that an ejectment lay not any more than for a common à prendre, or rent. And by Jones, J.: Peradventure an assise would lie of such a piscary, because it was a profit to be taken in a certain place.(i) Then, again, upon another occasion, certain tenants in tail covenanted to levy a fine and suffer a common recovery of lands, and of a fishery, but the defendant, the heir in tail, disputed the right to some part of the entailed property, in which ejectment was brought for the lands and fishery. It was objected, that such an action could not be maintained in respect of a fishery, especially in this case, which regarded a free fishing in the River Tyne, and the Court were of the same opinion upon that point, observing that the defendant must have judgment on that matter.(k)

(g) Id. 346 (b), in the note. Patrick v. Greenway, Oxford Spring Ass. 1796. Cor. Lawrence, J. (h) Cro. Jac. 146, Molineux v. Molineux.

(i) Cro. Car. 492, Herbert v. Laughllyn. (k) 8 Mod. 275, Waddy v. Newton.

Nevertheless, the opinion of Ashhurst, J., in a settlement case,<sup>(l)</sup> has been occasionally brought forward, as though it militated against the authorities above quoted.<sup>(m)</sup> That learned Judge said, he had no doubt but that a fishery was a tenement, that trespass would lie for an injury to it, and that it might be recovered in ejectment.<sup>(n)</sup> In this case, however, the Court held, that the fishery *and soil* had passed so as to confer a settlement; and there seems to be nothing in the opinion of Mr. Justice Ashhurst to warrant a conclusion, that he intended any other fishery than one which was connected with the soil.

A Court of equity is sometimes applied to either to quiet persons \*in the established possession of their fisheries, or to restrain others from an improper invasion of such rights. A case on this subject, [\*241] respecting a bill of peace, deserves attention here. The plaintiffs sued the defendants for an exclusive right of fishery in the Ouse, in Yorkshire, and that they might be quieted in the possession of their fishery, to prevent a multiplicity of actions. The answer of the defendant was, that they were lords of several manors and of large estates along the banks of the Ouse, and that they had always used to fish in those parts of the river which were contiguous to their land. However, the plaintiffs, pending this suit, indicted several persons in the Court of sessions in York, for fishing in the river under an authority from the defendants. Upon this the defendants prayed an injunction, to restrain the plaintiffs from proceeding in these indictments, on the ground of their being the judges in their own case. The defendants were the Mayor and Aldermen of York, and in the commission of the peace for that city. The application was opposed by the Attorney General, who denied the jurisdiction of the Court to stay proceedings in pleas of the Crown, notwithstanding that the question depended upon a matter of right submitted to the determination of the Court. It was said, on the other side, that this mode of proceeding by indictment would, in some measure, try the right; for if the persons indicted had an authority to fish, the defendants could not be guilty of the trespass. It was further urged, that by bringing their bill, the plaintiffs had excluded themselves from adopting any other method, or proceeding in any other Court. Lord Hardwicke, then Chancellor, observed, in the first instance, that the defendants had another course by which they might have gained redress. They might have gone to the Attorney General, and shewed him that the indictment was not for any violence or breach of the peace, but that a civil right was in dispute, and that it was the proper subject of an action of trespass; he would almost of course have granted a *cesset processus*, or *nolle prosequi*, especially where one of the parties, whose right was involved in the indictment, was to be the judge of the indictment. The Lord Chancellor went on to point out, that the plaintiffs had been wrong throughout the whole proceeding. They had made themselves their own judges; they had endeavoured, in some measure, to promote elsewhere the decision of a right

(l) *Rex v. Old Alresford*, 1 T. R. 358.

(m) See Adams on Ejectment, p. 20.

(n) *Id.* 361.

which they had submitted to the Court; and as their prayer was to prevent multiplicity of actions, they had, in that respect, acted inconsistently. Certainly, the Court could not grant an injunction to stay criminal proceedings at the suit of the Crown, for the Attorney General might still go on. But the Court might make an order on the prosecutor, party to a bill in the Court, not to prosecute, it being found that the indictment found at the sessions had been merely for fishing, without any \*circumstances of misbehaviour tending to a breach of the peace. And [\*242] in accordance with this judgment, the Court directed that there should be an order on the plaintiff, to stay him from prosecuting the defendants, or their agents, either by way of action or indictment, for exercising the right of fishing claimed by the defendants in their answer, until the hearing of the cause, or further order.(o)

But if after the exhibition of a bill of peace, and a decree against the defendants, they persist in annoying the plaintiffs by fishing, or by bringing suits at law, the defendants may, of course, be indicted for the trespass; or, in the other case, may be restrained by injunction from prosecuting their actions. It is observable, however, that a bill of peace will not succeed, unless the right has been previously established by a verdict at law.(p)

However, a bill brought by a party in possession for a commission to examine witnesses in *perpetuam rei memoriam*, in order to establish a sole right of fishing, has been entertained, it being suggested in the bill, that the defendant pretended to the sole right, and that he had threatened to bring actions when all the plaintiff's witnesses should be dead. For a man thus circumstanced has no other way to perpetuate the testimony of his witnesses; for not being actually disturbed or interrupted, he can bring no action at law. A demurrer to this bill was accordingly refused the plaintiff being in possession.(q)

In some cases the injured person may himself act, and abate nuisances or redress grievances done to his fishery. As, for instance, a commoner may remove any obstructions placed in the way of his enjoying his commonable privileges, provided he do not meddle with the soil. And it is manifest, that he who owns the land and water, also may destroy any obstructions which may have been placed in his territory to the detriment of his fishing. Moreover, as it is said in *Keilwey*, if a person take fish, he who has the water may retake them.(r)

But it is easy to be seen, that the perpetual intrusion of strangers into a fishery where they have no right, is an annoyance of too serious a cha-

(o) 9 Mod. 273, the Lord Mayor and the Aldermen of York v. Sir Lionel Pilkington and another. S. C. 1 Atk. 282.

(p) 2 Atk. 483, Lord Teynham v. Herbert. See 1 Vern. 308; and see also Prec. in Ch. 530, Bush v. Western, contra.

(q) Prec. in Ch. 531, Duke of Dorset v. Sergeant Girdler.

(r) Keilw. 30 (a), pl. 2, Mich. 13 H. 7, by Keble.

racter to be left to the slow operation and uncertain issue of an action. This impression prevailed in \*very early times, and many have been the provisions and remedies prescribed by the law against [\*243] such invasions.

It seems that a party whose fishery was invaded might, at common law have distrained nets and other instruments used in the depredation, as being their *damage feasant*; and the common law is still in force in this respect, although such ample powers are provided against intruders by the new statute, as considerably to enlarge the old remedy. For it was not competent to the owner to destroy nets at the common law. As in a case of trespass for taking and cutting the plaintiff's nets and oars, the defendant justified on the ground of his being seised in fee of a several piscary; and because the plaintiff endeavoured to row upon his waters with the oars, and to catch his fish with the nets, he took and cut the nets and oars as a safeguard of his fishing. But it was objected, that the defendant could not legally do this; and the Court assented, observing, that he might, nevertheless, have detained them *damage feasant*, in order to stop any further fishing.(s)

A statute passed in the reign of William and Mary,(t) but which is now repealed, gave the power of seizing, detaining, and keeping every net, angle, &c., used in any fishery without the consent of the owner or occupier.

And now, by 7 & 8 Geo. 4, c. 29, s. 35, if any person shall at any time be found fishing against the provisions of the act, [that is, taking fish without leave in a private fishery,] it shall be lawful for the owner of the ground, water, or fishery, where such offender shall be so found, or for his servant, or any person authorized by him, to demand from such offender any rods, lines, hooks, nets, or other implements for taking or destroying fish, which shall then be in his possession; and in case such offender shall not immediately deliver up the same, to seize, and take the same from him, for the use of such owner: provided always, that any person angling in the day-time against the provisions of the act, from whom any implement used by anglers shall be taken, or by whom the same shall be delivered up as aforesaid, shall by the \*taking or delivering thereof, be exempted from the payment of any damages [\*244] or penalty for such angling.

A demand must be made under this statute.

(s) Cro. Car. 228, *Reynell v. Champernoon*.

(t) 4 & 5 W. & M. c. 23, repealed by 7 & 8 G. 4, c. 27, as to fish, and persons wrongfully fishing, &c. The power of justices to grant search warrants, for the purpose of entering houses where nets, &c., were supposed to have been concealed is done away by this repeal. So also in the provision which subjected an inferior tradesman, apprentice, or other dissolute person, to full costs of suit in trespass, for presuming to fish. See with respect to the assistant of a gamekeeper seizing nets under 4 & 5 W. & M. c. 13, [now repealed]. 9 St. Trials, 329, *R. v. Annesley and Redding*. 1 East, P. C. 255, citing S. C.

Some offences against properties in fishings are criminally punishable. Such are, stealing the fish, unlawfully and wilfully taking or destroying them, breaking down the dams of fisheries, &c.

The recent enactments on the subject of criminal law have fully provided for these offences, and the old statutory provisions have been abolished.<sup>(u)</sup> It is desirable that the new law should be fully set out, because it contains the present regulations upon this important matter, and we shall proceed to mention, first the remedies for taking fish in private waters. Secondly, for taking oysters in private oyster layings; and, thirdly, for malicious injuries to fisheries.

As to the first, it is declared, that if any person shall unlawfully and wilfully take or destroy any fish in any water running through, or being in any land adjoining or belonging to the dwelling-house of the owner of such water, or person having a right of fishing therein,<sup>(v)</sup> every such offender shall be guilty of a *misdemeanor*; and being convicted thereof, shall be punished accordingly.

Then, next, if any person shall unlawfully and wilfully take or destroy or attempt to take or destroy, any fish in any water not being such as aforesaid, *but which shall be private property, or in which there shall be any private right of fishery*, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the fish taken and destroyed, (if any), such sum of money, not exceeding 5*l.*, as to the justice shall seem meet.

[\*245] The justices are not bound to enter into evidence of the defendant's right, \*unless they see fit. Therefore, in a case where they had jurisdiction over the subject-matter, upon a motion for a writ of prohibition, they were held justified in declining to look into the defendant's title deeds, although he claimed a right, as a copyholder, to fish in a public fishery. And *R. v. Little Bolton*,<sup>(w)</sup> was distinguished and considered not to apply.<sup>(x)</sup>

Where there were two convictions for fishing under this section, (*s.* 34), one of which was acknowledged to be good, it was held that both might be received in evidence in an action of trespass, though the good

(u) St. West. 1. 3 Ed. 1, c. 20; and see 2 Inst. 199. 31 H. 8, c. 2. 5 El. c. 21. 22 & 23 Car. 2, c. 25. 4 & 5 W. & M. c. 23. 9 G. 1, c. 22. 5 G. 3, c. 14. 4 G. 4, c. 54.

(v) The words, "*bred, kept or preserved*," were inserted in the 5 G. 3. And in an indictment against Caradice and others, for entering an inclosed park, and taking fish bred, kept, and preserved there, the conviction of the prisoners was holden wrong, because it appeared, that when the river entered and passed out from the park, there was nothing to keep in the fish, which therefore, could not be said to be bred, kept, and preserved there. *Russ. & Ry. C. C.* 205, *Rex v. Caradice* and others. This objection, it seems, would be unavailable under the new act.

(w) 1 Q. B. 66.

(x) 17 Law J., Q. B. 63, n. *Ex parte Higgins*. S. C. 8 Q. B. 149, n.

conviction had not been returned to the sessions.(y) And although it was objected to the conviction, that it failed to negative that the water ran through land adjoining or belonging to the dwelling-house of *any other person, &c.*; the Court said, that it was enough to negative that the water ran through land adjoining the dwelling-house of the complainant.(yy)

Next follows a provision concerning anglers. There is a proviso to exclude from the above penalties and punishment any person angling in the day-time; and then it is provided, that if any person shall by angling in the day-time unlawfully take or destroy, or attempt, &c., any fish in any such water as first mentioned, (that is, adjoining to a dwelling-house), he shall on conviction before a justice, forfeit and pay a sum not exceeding 5*l.*; and if in any such water as last mentioned, (that is, in any private fishery) a sum not exceeding 2*l.*, at the discretion of the justice.

Moreover, if the boundary of any parish, township, or vill, shall happen to be in or by the side of any such water as is hereinbefore mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill, named in the indictment or information, or in any parish, &c., adjoining thereto.(z)

The common law upon this subject had been much amended [\*246] \*and altered by statutes passed before the 7 & 8 Geo. 4, c. 27, (and which this latter statute repeals), but those provisions treated the taking of a fish as a felonious act, whereas by the present law such an offence is a misdemeanor only; and the taking of fish is upon some occasions, punishable by a summary conviction. The doubts regarding the description of ponds in which felony might have been committed, or whether a person might be convicted of larceny for stealing fish in any pond, have long been set at rest; and the present enactment, it will be observed, has the general words, "water in which there shall be any private right of fishery," which seem large enough to obviate all future objections on that score.

This universal description of private waters seems to avoid the painful difficulty which occurred some years since, in a case where a respectable magistrate was held liable in an action of trespass for false imprisonment, because the statute 5 Geo. 3, related to water in inclosed grounds only. The matter was decided upon the legality of a warrant of commitment which was issued against the plaintiff, after a conviction for attempting to

(y) *Charter v. Græme*, 3 New Sess. Ca. 318, was fully supported by the Court. See 16 East, 13, *Gray v. Cockson*.

(yy) 3 New Sess. Ca. 603, *Fuller v. Brown and another*. In this case a right of fishery had been granted by the Mayor, &c. of Cambridge, to the complainant, subject to a proviso, that the mayor, &c. might fish at his pleasure. The lease had not been executed, nor any counterpart by the lessee. It was held that the mayor and the aldermen who had adjudged the case, were not interested so as to disqualify them from hearing and deciding it.

(z) 7 & 8 G. 4, c. 29, s. 34.

destroy fish in a private fishery. The offence was described to be for fishing with a rod and line in a pond or pool of water, commonly known by the name of the Reservoir, in the parish of Aldenham, the right of fishing in said pond or pool being the private property of the Honourable and Reverend William Capel. It was objected for the defendant, at the trial, that the conviction was conclusive evidence in his favour, and that the plaintiff could not controvert the facts alleged there; but the learned Judge said, that the plaintiff might shew the reservoir not to have been within inclosed ground; that the conviction did not bring the case within the act of Parliament, and that the case itself, not being within the jurisdiction of the magistrate, the plaintiff was entitled to a verdict. A rule having been obtained to set aside the verdict for the plaintiff, and have a new trial, the Court held that the warrant of commitment was illegal, because the pond or pool was not inclosed ground, being private property, and therefore not within the protection of 5 Geo. 3; and although the direction of the learned Judge at the trial might have been wrong in stating, that the conviction was conclusive evidence of the facts contained in it, yet the warrant of commitment ought always to shew an offence. The defendant having refused to go to a new trial upon the merits, as the plaintiff had proposed, his rule was discharged, and the verdict of 35*l.* damages was consequently established.<sup>(a)</sup>

[\*247] \*This decision is introduced here for the purpose of shewing, that as the commitment was considered there to be vicious, because the injury was not done in an inclosed place; according to the present act, the provisions are sufficiently ample to comprehend any kind of private fishing.

The summary of the new act may, therefore, be taken to be as follows:—The penalties consequent upon a misdemeanor are awarded against such as catch fish by day or night from water adjoining, or belonging to a dwelling-house, or attempt to commit such an offence. Then follows the conviction before a magistrate; first, of those that take, or attempt to take fish by day or night from any private water, other than the above, the penalty being 5*l.* Secondly, of such as take, or attempt to take fish, by day, by angling, in water adjoining to a dwelling-house, and the penalty is in this instance also 5*l.* Lastly, of such as angle in like manner in other private water than the above.<sup>(b)</sup>

(a) 2 Bing. 483, Wickes v. Clutterbuck. See also 5 Taunt. 440, Lisle v. Brown. S. C. 1 Marsh. 127. 2 Chip. Rep. 519, R. v. Sadler. These being also decisions concerning fishing in *inclosed* grounds, are materially affected by the present statute. Notice of action should be given to a person who has bona fide apprehended a trespasser upon a fishery, although the watcher may be a little removed from the boundary of his jurisdiction. 3 Dowl. & L. 702. 15 M. & Wels. 346. 15 L. J., Exch. 233, Hughes v. Buckland.

(b) It is worthy of notice, that the capital offence of stealing fish out of a pond, or river, by persons armed or disguised, contrary to 9 G. 1, c. 22, no longer exists. The st. 4 G. 4, s. 54, extended the benefit of clergy to that offence, and the new act of 7 & 8 G. 4 abolished the act of G. 1 altogether.



The following case occurred under 5 G. 3, (an act which is now repealed), respecting an assertion of right to fish. It was an action of debt, for a penalty of 5*l.* for killing fish. The defendant was servant to Dr. C., who claimed a right to the fishery. An action of trespass had been brought against some of the doctor's servants previously to this time, and a verdict had been found for the plaintiff. A new trial had also been refused. The doctor, however, was not satisfied, and gave notice to the plaintiff that he should order one of his servants to fish in the same place, in order that he might have an opportunity to try the right again. In obedience to these orders the defendant committed the fresh trespass; but instead of trespass, an action of debt was brought under the above statute. The defendant's counsel offered to shew this notice on the part of Dr. C., observing that he should contend, upon such proof, for a nonsuit, there having been an assertion of a right, which was not an offence within the act, and was besides within the express exception in section 5, in favour of persons having *a just right, or claim*. Nevertheless, Mr. Baron Peryn, who tried the cause, [\*248] refused to hear the evidence; and the learned Judge, moreover, admitted the record of the verdict and judgment in the former cause, to shew the plaintiff's exclusive right to the fishery, although it was objected, that the former action and this were not causes between the same parties, the name of the present defendant being Thomas, and of the other William. A verdict having, accordingly been found for the plaintiff, it was moved to have a new trial, on the ground of misdirection in the above particular; and after hearing the counsel against the rule, the Court did not think it necessary that the plaintiff's counsel should reply. They thought that the defendant should have been let in to prove the notice of Dr. C.; for that, had such notice been proved, the case would not have been within the act. And Mr. Justice Buller added, that to construe the clause in the manner contended for by the plaintiff, would be to read the words "right *and* claim," instead of "right *or* claim." The Court also considered, that the record of the former verdict, though admissible, was not conclusive evidence.(c)

There remains, however, still, as at common law, the remedy by indictment for a forcible entry and detainer, although such outrages upon fisheries are seldom, if ever, heard of at present.(d) But, it seems, that an indictment would not lie for a conspiracy to commit a trespass upon such property, because in general the object of the combination must be effected by some falsity, in order to create such an offence; and upon the consideration of a case against persons for taking hares in a preserve, the Court said, that persons agreeing to go and sport upon another's ground, or, in other words, to commit a civil trespass, ought not to be in peril of an indictment for an offence which would subject them to infamous punishment.(e)

(c) Dougl. 517, *Kinnersley v. Orpe*.

(d) See 8 T. R. 357, *Rex v. Wilson*, Chit. on Fisheries, p. 308.

(e) 13 East, 228, *Rex v. Turner* and others. Chity, p. 308, ut supra,—i. e. for conspiracy. But the pillory is now abolished.

And an indictment lies for taking fish out of a private pond.(f)

The recent enactments above referred to, have repealed the old laws respecting the unlawful taking of oysters; and now by 7 & 8 G. 4, c. 29, s. 36, if any person shall steal any oysters, or oyster-brood, from any oyster bed, laying, or fishing, being the property of any other person, and sufficiently marked out and known as such, every such offender shall [•249] be deemed guilty of \*larceny, and being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any such oyster fishery, for the purpose of taking oysters, or oyster-brood, although none shall be actually taken, or shall, with any net, or instrument, or engine, drag upon the ground or soil of any such fishery, every such person shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be punished by fine and imprisonment, or both, as the Court shall award, such fine not to exceed 20*l.*, and such imprisonment not to exceed three calendar months; and it shall be sufficient in any indictment, or information, to describe, either by name, or otherwise, the bed, laying or fishery, in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill; provided always, that nothing herein contained shall prevent any person from catching, or fishing for any floating fish within the limits of any oyster-fishery, with any net, instrument, or engine, adapted for taking floating fish only.(g)

Various statutes on the subject of malicious damages to fisheries having been repealed, it was enacted by 7 & 8 G. 4, c. 30, s. 15, that if any person shall unlawfully and maliciously break down, or otherwise destroy the dam of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or any other noxious material in any such pond, or water, with intent thereby to destroy any of the fish therein, or shall unlawfully and maliciously break down, or otherwise destroy the dam of any mill pond, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition to such imprisonment.

This new act has abolished the 9 G. 1, c. 22, (the Black Act,) which

(f) See post, Chap. XII., Pleading; Chap. XIII., Evidence.

(g) This offence was declared by 31 G. 3, to be a misdemeanor, and subsequently, it was declared to be felony by 48 G. 3, c. 144; but both those statutes are repealed. *Rex v. Walford*, 5 Esp. 62, was determined under the 31 G. 3; but that case does not apply now.

prescribed capital punishment against offenders of the above description. The Black Act had been previously modified by 4 G. 4, c. 54, which extended benefit of clergy to the offence.

\*The words "with intent to take and destroy," seem to avoid a difficulty which arose under the old law, and occasioned the acquittal of a prisoner, charged with breaking down the mound of a fish-pond, whereby the fish were lost or destroyed; for the Judges held upon that occasion, that as the object of the purpose had been to steal the fish, with a view to do which act he had broken down the head of the pond to let the water out, he could not be said to have broken it *maliciously*, so as to promote the loss, or destruction of the fish.(h)

It is evident, that the chief injuries sustained by millers, arise from the disturbance of their streams, in consequence of which they are hindered from working their mills as they otherwise would. Of these mischiefs we shall treat at some length when we come to consider the obstructions of watercourses, under which head they more properly fall. But there are other damages which are occasionally committed upon this description of property, and of these, together with the remedies for removing them, we propose to speak in the first instance; after which we shall mention, incidentally, some instances in which the mills themselves have been deemed to be obstructions. As to the first point, it is observable, that a house may be so built, as to be a nuisance to a mill; and in such case it is clear, that an action will lie for the mischief.(i) So again, injuries frequently happen to a property of this kind, through the wilful neglect of persons, who, instead of grinding their corn there, according to the custom, take it elsewhere; and for this offence, also, a remedy may be had. And there are, moreover, many wilful damages which have been made the subjects of particular indictments by the Legislature, and which come principally under the description of malicious injuries. Such, for example, as the burning of mills, riotously assembling and pulling them down, or beginning so to do.

The civil remedies for the mischiefs above enumerated, are the proceeding by distress, and which is now the more usual remedy, the action upon the case. The ordinary criminal proceedings are by indictments, summonses before magistrates, &c.(k)

But again, the party might distrain for the suit,(l) although \*this mode of redress is also, for the most part, become obsolete. And [\*251]

(A) 2 East, P. C. 1067, Ross's case.

(i) See 3 Salk. 248.

(k) The old writ of *secta molendini*, which is now abolished, was said to lie most properly where one held by fealty and suit to a mill, and refused to do the suit, by Newton, 22 H. 6, 14. Bro. Nuisance, pl. 12, cites S. C. And the count upon the writ might have been by reason of the tenure of the land, or by reason of prescription. F. N. B. 123.

(l) 22 H. 6, 14, by Newton. Bradby on Distresses, 157.

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indeed, it may be said, that the action on the case superseded most of the old writs in use for the subtraction of services, for by that action the party received reparation in damages, a far more convenient remedy than the special proceedings to compel a specific performance of the required duties.(m)

Therefore, we find, that in the reign of Charles II., the action on the case was resorted to, where the defendant had omitted to grind his wheat and barley at the mill of the plaintiffs.(n)

Mills are especially mentioned as the subjects of arson in 1 Vict. c. 89. By sect. 8, of that statute, if any person shall unlawfully and maliciously set fire to any church or chapel, &c., or shall unlawfully or maliciously set fire to any house, &c., mill, &c., whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, every such offender shall on conviction be transported for life, or for any term not less than fifteen years, or be imprisoned for any term not exceeding three years.(o) It is observable, that the mere act of setting fire to a mill shews, if unexplained, an intention to injure; and it was so held under the old statute. A prisoner was charged with arson by firing a mill, and his guilt appeared very clear from his own confession. He was convicted, but sentence was respited, because there was no evidence to prove a particular intent to injure or defraud any person under the stat. 43 Geo. 3, c. 58, (now repealed;) the prisoner, on the contrary, being described by the witnesses as a harmless, inoffensive man. The conviction could only be sustained upon the above statute, because the other act upon the subject, 9 Geo. 3, c. 29, (now repealed,) had limited a prosecution to within eighteen months, and nearly three years had elapsed in this case, from the time of committing the offence. The Judges were of opinion, that burning a mill under the circumstances disclosed, must necessarily have been done with an intent to injure, notwithstanding that the principal object of Lord Ellenborough's Act was to comprise the cases of a person burning the house, &c., or mill of which he was the tenant or owner, to the injury of his landlord or neighbour, or \*to defraud insurers; and, consequently, the conviction [\*252] was considered to have been proper.(p)

We have seen in a former page,(q) that the unlawful and malicious breaking down, or otherwise destroying the dam of a mill pond, is punishable as a misdemeanor,(r) and proceed to mention the punishment for demolishing such property in a riotous and tumultuous manner. The same act

(m) See 3 Comm. 235. (n) 2 Saund. 112, *Coryton and others v. Lithebye*.

(o) By sec. 12. This imprisonment may be with or without hard labour and solitary confinement, provided the solitary confinement do not exceed one month at any one time, nor three months in any one year.

(p) *Burn's Justice*, by Ghetwynd, vol. i. p. 418, *Farrington's case*. S. O. Russ. & Ryan. 207.

(q) Page 249, *ante*.

(r) 7 & 8 G. 4, c. 30, s. 15.

for the suppression of malicious injuries provides, that if any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force, demolish, pull down, destroy, or begin to demolish, &c., any church or chapel, &c., mill, &c., every such offender shall, on conviction, suffer death as a felon.<sup>(s)</sup> But by 4 & 5 Vict. c. 56, s. 2, the capital penalty is abolished, and the convict is made punishable by transportation for any term not less than seven years, or by imprisonment for any term not exceeding three years.<sup>(t)</sup>

And, lastly, it may be added, that a mill is one of those buildings, for the destruction of which the hundred are bound to make full compensation.<sup>(u)</sup>

An indictment at common law, for a forcible entry and detainer, will lie in respect of a mill. The defendants were charged with having unlawfully, and with a strong hand, entered the mill of the proprietor, and expelled him from the possession. To this they demurred generally; and it was urged on their behalf, that this was merely a private trespass, and not a public breach of the peace. But the Court declared themselves clearly of opinion, that the defendants were indictable for this act, for the peace of the whole country would be endangered if it were not so; and it appearing by the indictment that the defendants unlawfully entered, the Court could not intend that they had any title.<sup>(v)</sup>

Upon one or two occasions a person may be summarily convicted before magistrates for mischief done to mills. By the Highway Act, it is declared, that if any person shall dig, or cause to be dug, materials for the highways, contrary to the \*direction of the act, whereby any bridge, mill, &c., may be damaged or endangered, he shall forfeit [\*253] a sum not exceeding 5*l.*, at the discretion of the justices, before whom complaint thereof shall be made, notwithstanding his liability to any civil action, to which he may make himself liable by such act.<sup>(w)</sup>

We have said, that obstructions are now and then caused by mills. Sometimes this mischief is occasioned by the erection of new mills; and as far as the disturbance of ancient watercourses is affected thereby, the reader may be referred to the latter part of this Chapter, where the subject is treated of. And we have seen in a former page,<sup>(w)</sup> that commissioners of sewers are empowered, under certain circumstances, to abate mills, mill stanks, &c., by virtue of the powers extended to them by the statute of sewers. If a mill, however, be set up in a manor, or elsewhere in contravention of a custom, it is not in general competent for the party injured to obtain a decree in equity for its abolition, although the neighbouring tenants and servants may be prohibited by a decree from grind-

(s) *Id.* s. 8.

(t) This imprisonment may be with or without hard labour, &c. See the note at p. 251.

(u) 7 & 8 G. 4, c. 31, s. 2.

(v) 8 T. R. 357, *Rex v. Wilson and others.*

(w) 5 & 6 Wm. 4, c. 50 s. 57.

(w) *Ante*, p. 193; and see Woolrych's "Law of Sewers."

ing at the new mill. And thus, in a case where a mill had been erected out of the manor, a bill praying to have it demolished was ordered to be dismissed, but without prejudice to the lord of the manor. And the Court said, that it was lawful for any tenant to set up a mill upon his own ground, out of the manor, but not within the manor; although, if the owner or tenant of such a mill, out of the manor, should cause or persuade any of the tenants or residents within the manor to grind there, or fetch any grist out of the manor to his own mill, it was stated that he might be prohibited by a decree of the Court.(x)

So, again, where a new mill had been erected within a manor where many of the copyhold tenants resolved to grind their corn, it was decreed in the Exchequer, against the defendant, who had erected the mill, that he should not withdraw or take away any grist from the other mill; but the mill was not decreed to be demolished; for that can be done in the King's own case only, or in the case of his patentee.(y) So, again, a bill in equity was preferred, for the purpose of obtaining a decree to demolish a mill near one of the King's manors, which had been granted to the plaintiff in fee-farm. It appeared that the farmer had mills, which were prejudiced by reason of the proximity of the new mill; and the Court doubted whether they could decree the destruction of a mill which was not within the King's manor, where there was neither tenure nor [\*254] custom whereby the inhabitants were obliged to grind at the \*King's mill. And a day was given to search for precedents; but the reporter adds, upon search made, none could be found to warrant such a proceeding.(z)

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As we have already observed, the user of private immunities must be so regulated as not to interfere with or injure the right of others. If one man, therefore, use his right of water inimically to the interests of his neighbour, without a lawful cause for so doing, he is answerable for any damage which he may occasion. And a fortiori, if a stranger should meddle with the enjoyment of an easement to which he has no manner of title, he will be placed in the like condition.

Thus, it was, where a prior brought an action against the defendant, for injuring a watercourse which the plaintiff and his predecessors had immemorially enjoyed for various necessary uses, such as watering beasts, cooking, brewing, &c. The defendant, a glover, had made a lime-pit for calves' skins and sheep skins, so near to the rivulet as to corrupt the stream, so that the tenants of the prior had been compelled to quit their houses. The Court considered this act to be a nuisance.(a)

The enlarging of ancient channels is an act which may render the par-

(x) Hardr. 174, *Green v. Robinson and others*.

(y) Id. 177, *White and Snoake v. Potter*.

(s) Hardr. 184, *The Mayor and Burgesses of Scarborough v. Skelton*.

(a) 13 H. 7, 26. S. C. cited 9 Rep. 59.

ty so proceeding seriously responsible. Thus, the plaintiff brought an action on the case for a diversion of his watercourse, complaining that the defendant had dug two pits, and had made two ponds near his course, so that the water which had been accustomed to flow into the plaintiff's grounds, was diverted into these pits and ponds. The defendant answered that all the water sprang in his own soil; that he and those, &c., had immemorially used those pits for the watering of his meadows and cattle; and that as the pits were choked up with mud, he dug the holes which the plaintiff had complained of, and made dams and banks accordingly. But the Court held, that the law was not with the defendant upon this occasion; that he had in effect, confessed the plaintiff's action; that he had not any right to enlarge ancient pits; and that if he had any prescription, he should have brought it forward. Judgment was given for the plaintiff.(b)

Hence it appears, that it is no matter if the water have its origin in the ground of the person making the obstruction, the gist of the mischief being the damage done to the possession of another.

\*A possession of water for twenty years has always been considered as *prima facie* evidence of the right. A case occurred, in [\*255] which it appeared that the plaintiff and defendant occupied closes adjoining to each other, on the River Medway. There had been a gush of water, time out of mind, from a hole in the close of the plaintiff, which ran along from thence into the river. About twenty-seven years before the action, the occupier of the plaintiff's close erected a bath on it, and a plentiful supply of water was derived from the spring. The plaintiff bought the close subsequently, and built a paper manufactory; and the defendant becoming the owner of the adjoining close opened a stone quarry therein. Finding the water inconvenient, the defendant caused a deep drain to be made; but by reason of the excavation, the water, which was accustomed to flow so abundantly into the plaintiff's bath, decreased gradually, until it was reduced to about an eighth or tenth part of the former quantity. For this damage the action was brought.

The defendant intended to urge, that the cases in which the enjoyment of water for twenty years had been considered as conclusive, were sustainable only on the prescription of a grant from owners of land further up the stream, and that there could be no such presumption in the present action, because no one, probably knew the source from whence the plaintiff derived his supplies of water. But Lord Ellenborough intimated his opinion, that the only question was, whether the diminution of the plaintiff's supply was attributable to the drain dug by the defendant; and said, that the exclusive enjoyment of water, in any particular manner, for twenty years, afforded a conclusive presumption of right.(c)

It should be remarked here, that this point respecting the possession

(b) 1 Wils. 174, *Brown v. Best*; and see *Hetl.* 32.

(c) 1 *Campb.* 463, *Balston v. Bensted*.

for twenty years, had been much discussed three years before, in the great case of *Bealey v. Shaw*,<sup>(d)</sup> (which we shall refer to presently),<sup>(e)</sup> and that, upon a due consideration of the matter, it was determined, that as running water was *publici juris*, whoever should appear to have first appropriated to his own use any part of a stream which had not previously been made the subject of a private right, might maintain an action for disturbance of his possession, although his dominion over the water had existed for a season much short of twenty years.

[\*256] There is another rule upon this subject deserving of attention, \*and it is, that the acquiescence of lessees will not bind the landlord, nor of the tenants for life him who has the reversion. The law on the question of dedication of ways to the public is the same.<sup>(f)</sup> With respect to the right of water, an action was brought by the tenant of a farm, for the diversion of water from his wear. It appeared that A. was tenant for life, and that he made a jointure, in pursuance of a power which he had for the purpose; that in 1747 he gave a license to B. to erect a wear in his, A.'s soil, for the purpose of watering B.'s meadow; that A. died, and that the jointress entered, and continued seised till 1799, when the tenant of the farm which A. had, diverted the water from the wear. The Court were of opinion, that this acquiescence of the particular tenants for life would not affect the reversioner, although they refused to disturb a verdict which had passed for the plaintiff, inasmuch as the decision for the plaintiff would not conclude the rights of the parties.<sup>(g)</sup>

Again, if one man should interfere with the waterspout of his neighbour, and so divert the course of the droppings, to his prejudice, he will be responsible for so doing. So that, where one had a spout above his house, whence the water was accustomed to fall, and another erected a house adjoining, so that the course of the water being disturbed, it fell on the walls of the old house, to the prejudice of the timbers, it was held to be a nuisance.<sup>(h)</sup>

Perhaps, if a well were shown to be an *ancient* well, an action might lie for interfering with the water. But in general this is not so. Therefore, where the defendant carried on mining operations in his own land in the usual way, but thereby drained away the water from his neighbour's well, it was held that the plaintiff had not such a sufficient right or interest in the subterranean water, to enable him to maintain an action.<sup>(i)</sup>

There was an agreement between A. and B. to refer. A. claimed a yard and pump as his exclusive property. B. had entered the yard after

(d) 6 East, 208.

(e) See post.

(f) See 5 B. & A. 354, *Wood v. Veal*; and a "Treatise of Ways," 1829, p. 13.

(g) 2 Wms. Saund. 175 (d), *Bradbury v. Grinsell*.

(h) 18 E. 3, 22, B. 9 Rep. 54.

(i) 12 Mees. & W. 324, *Acton v. Blundell*.



notice, and had taken water from the pump. A hedge and ditch divided the lands of A. and B., which A. alleged that B. had removed into his, A.'s land. The matter being referred, the arbitrator was empowered to direct the future enjoyment, care, and management of the yard, pump, and hedge. The yard and pump were awarded to A., subject to B.'s easement, but, nevertheless, A. and B. were for the future jointly to repair the yard and pump at their joint cost. It was \*further awarded, that B. had not removed the hedge and ditch into A.'s land; but, [\*257] that the hedge should thereafter be kept in repair by B. B. for that purpose might take mud from the ditch. Subject to such privilege, the ditch was to be thenceforward considered to be the ditch of A. It was held, that the direction as to future enjoyment was not inconsistent with the other part of the award, and that the arbitrator had not exceeded his authority. The submission also recited, that trespass had been brought by A. against B., and also an agreement that the costs should abide the event of the award. It was held, that the arbitrator could not make any award as to costs, and not having decided all the matters referred in favour of either party, each must pay his own costs. (k)

But, (returning to the detail of obstructions,) perhaps no mischiefs of this nature have proved a more fruitful source of litigation than injuries sustained by millers, in consequence of the obstruction or misuse of watercourses by their neighbours.

A remedy for such grievances was very early acknowledged by our law; and although the circumstance of each case are seldom, if ever, the same, there are yet some general principles, to which it may be safe and useful to refer, as being applicable, for the most part, to the rights of parties who are engaged in disputes. To mention one or two, before we enter generally upon the decisions:—it is allowed on all hands, that water is, in the first instance, common to all, but that it is in the power of an individual to appropriate a portion of that universal property to himself for his own private benefit, whereby he acquires a title to use the stream, (so reduced into possession, as it were,) independently of, and without molestation from others. A watercourse, however, being obviously of great commercial value, rights, both in public navigable rivers and others, were soon asserted; and then it happened, that the person who first appropriated the water could no longer go on engrossing the channel to his own advantage, because, however he might have been justified in so doing before a second appropriation, he would, probably, interfere with his neighbour, by any further acquisition. Hence, many altercations have arisen between the original proprietors of a stream, and new comers who assume a right, (and most frequently with success,) to participate in the benefit. And a very clear rule of law results from these considerations;—namely, that the author of any prejudice or nuisance to his neighbour, occasioned by obstructions, whether he be the ancient owner who attempts an unlawful extension of his easement, or a

(k) 4 Nev. & M. 183, *Boodle v. Davies*.

[\*258] \*stranger who encroaches upon the old right, shall be answerable in damages for the misfeasance which he may have committed.

It is no matter for what purpose the water may have been diverted, if the miller sustain damage in consequence. Thus, it was said, many centuries back, that if a course of water should run to a mill, and the tenant of the adjoining land should do something by which it would flow in another direction, so that the mill, instead of grinding ten quarters in one day, would grind one quarter only, a remedy might be had at law for the mischief so done.<sup>(l)</sup> So again, it was affirmed, that, upon the building of a new mill on the banks of the same river, where one had already existed time out of mind, there would not be any redress on behalf of the proprietor of the ancient mill, *provided the new comer should neither stop the flow of the water to the other mill, nor cause too great an abundance of water*, whereby it might be hindered from working.<sup>(m)</sup> So also, if stake nets be put into the river, and thus prevent the enjoyment of sufficient water, by which the profits of the mill are diminished, a remedy is open against the wrong doer.<sup>(n)</sup>

Any act, which alters the accustomed course of the water, is an obstruction. So that the *straitening* of a channel, by the erection of piles and pales, by which the usual flow of the stream is interrupted, is such an injury as will justify an action. By narrowing the bed, along which the water flows, its course is altered, and the grinding of a neighbouring mill might thus be seriously hindered.<sup>(o)</sup> So again is the making of a ditch across a river which runs to a mill, though the ditch be on the defendant's soil.<sup>(p)</sup> One had an ancient watercourse, or river coming to his mill, and the old banks of the river having become hollow, a dam was made in the ground of another person by the direction of justices, about a rood from the old bank, and the water was thus holden in. A stranger, not the owner of the ground, cut the dam, and an action on the case was brought. Hobart, C. J., fearing lest judgment might pass against the plaintiff, by reason of the insufficiency of the declaration, caused the trial to be stayed, and the declaration being considered faulty, the plaintiff was directed to take a new writ.<sup>(q)</sup>

A person, who had a freehold in a meadow, through which a certain [\*259] \*stream was wont to run, constructed a wear, or dam, across the current, so that a mill in the vicinity, which used to grind two quarters of wheat per day, would scarcely grind one quarter. No question was made but that this conduct was actionable; the only dispute being, whether the proper remedy had been adopted.<sup>(r)(s)</sup> An assise of nuisance was the ancient mode of proceeding in those days, and, on one

(l) 2 H. 4, 11. B.

(m) 22 H. 6, 14. 1 Ro. Ab. 107, cites S. O. 3 Ridgw. 319.

(n) 9 E. 4, 35. (o) 48 E. 3, 27. Bro. Na. pl. 7, cites S. C.

(p) F. N. B. 183, 184, note (b). (q) Hob. 193, Biccot v. Ward.

(r) It was an action on the case. (s) Dy. 248 b. See 3 Mod. 49.

occasion, judgment was given against the defendant upon such an assise, for diverting the major part of certain water, but error was brought in the King's Bench.<sup>(t)</sup> The judgment, however, was subsequently affirmed.<sup>(u)</sup> The same difficulty arose as to the form of action, where the defendant was charged with making a *trench*, and so letting the water out, to the damage of a mill;<sup>(v)</sup> but the act of making the trench was not considered by any means defensible.

An obstruction of this nature may also be created by the erection of a *new mill*; for he, who has already appropriated to himself so much of the water of the stream as may be sufficient for his uses, shall not be prejudiced by the coming of a stranger; but he must shew, that he has sustained some injury by the new erection. Thus the plaintiff complained, that the defendant had erected a new mill, by which the course of the water was narrowed, and so had done damage to the plaintiff's mill; and, after a verdict for the plaintiff, it was moved to arrest the judgment, because it had not been stated in the declaration that the mill obstructed was an ancient mill; but the Court disallowed the exception.<sup>(w)</sup>

It is right to observe here, that, although mention has been made of an *ancient mill*, there are many decisions which clearly prove, that a party has no more power legally to obstruct a new, than an old mill. Thus, an action on the case was brought for disturbing a watercourse, which originally ran to two fulling-mills; but it appeared that these mills had been pulled down, and that two grist mills had been erected in their room, whereupon it was alleged for error, after judgment for the plaintiff, that the prescription had been destroyed by the new building, and, by consequence, that the right to the watercourse was gone. But the Court said, that here the mill was the substance, and \*that [260] the addition of grist, or fulling, would but shew the quality, or nature of it; that the law was the same as to estovers, which a tenant could not lose if he were to build a new chimney, or make an addition to his old house; and the same again as to lights, which a man would not be deprived of, if he should convert a hall into a parlour, and so on; and the judgment was affirmed.<sup>(x)</sup>

So, in another case, the plaintiff declared, that he was seised of a mill, and that he had enjoyed a watercourse time out of mind, which had been accustomed to run in a moderate and perpetual course; but that the defendant had diverted it to the plaintiff's damage. A verdict having passed for the plaintiff, it was moved in arrest of judgment, that it ought to have been alleged, that the mill was an *ancient mill*, and that for want of this, the prescription had failed; but the Court disallowed the

(t) Ibid., Wyke v. Serle, cited there. S. P. Bendl. 223. Hornedon v. Pain.

(u) 4 Rep. 89 (a), where the case is cited. See Dy. 195 (b), Sir Gilbert Debenham v. Bateman. 2 Bulstr. 196.

(v) 21 H. 7, 30.

(w) 1 Leon, 273, Russel v. Handford.

(x) 4 Rep. 86, Cottel v. Luttrell.

objection.(y) And by Doderidge, J. "If one erect a new mill, upon his freehold, and another divert the course of the water of this mill, although it might still flow by his land, yet, if the water used to follow this course, an action on the case lies against him; for he cannot use his land, nor the water which passes by his lands, to the damage of the other."(z) Notwithstanding these authorities, the objection was again renewed upon another and a similar occasion; but the Court said, that the stopping of the water was tortious, and a damage to the mill, and there was no need of shewing the que estate.(a) And Lord Hale spoke strongly to the same effect, when giving judgment in a case concerning the stopping of lights. He said, after observing how unnecessary it would be to state the mill to be ancient, that it would appear upon the evidence, whether the defendant had ground through which the stream ran before the plaintiff, and whether the defendant used to turn the stream as he saw fit; for that, otherwise, he could not justify it, *though the mill were newly erected.*(b)

The question, nevertheless, had not been considered as settled, and we shall find a modern decision presently tending to the same conclusion. A few years after the delivery of Lord Hale's opinion as above, an action was brought for the diversion of a watercourse, and, after judgment for the plaintiff, it was objected on error, that the mill had not been set forth as an ancient mill, and that the plaintiff had not entitled himself to the watercourse, by prescription or otherwise. But the Court affirmed the [\*261] \*original judgment, saying, that there could not be a course of water, time out of mind, towards a mill *newly* erected, thereby assuming, that the miller might maintain an action for damage done to a new mill.(c) According to the report of this in Levinz, the question was considered very doubtful, and, at one time, the Judges were against the plaintiff. For although North, C. J., held the declaration sufficient, Windham, J., and Charlton, J., were of a contrary opinion, and Levinz, J., hesitated. North being advanced to the great seal, Pemberton, C. J. (who succeeded) was in favour of the declaration, and Windham, J., having changed his mind, the judgment was affirmed. Mr. Justice Levinz still doubted, and Mr. Justice Charlton maintained his former impression.(d) However, it ought not to be overlooked, that this case was before the Court *after verdict*, and, therefore, the observation of Holt, C. J., is worthy of notice, that he would have nonsuited the plaintiff for want of proving his prescription.(e) For although it might not have been necessary to have set out a prescription, to use the water time out of mind, yet having done so,

(y) Palm. 290, *Le Countec de Rutland v. Bowler*.

(z) *Id. Ibid.*

(a) Cro. Car. 575, *Sands v. Trefuses*. *Id.* 500. Anon. S. P.

(b) 1 Ventr. 237. 3 Keb. 133.

(c) 3 Mod. 48, *Hebblethwaite v. Palmes*, S. C. Carth. 84. Comb. 9. *Keblethwaite v. Palmes*, S. C. 2 Show. 64, nom. *Palmer v. Keblethwaite*, S. C. 2 Show. 243, nom. *Palmes v. Keblethwaite*, S. C. *Id.* 249, nom. *Palmis v. Kiblethwait*, S. C. Holt's Cases, 5, nom. *Heblewait v. Palmes*, S. C. Skin. 65. 175, *Palmes v. Heblethwait*, S. C. 3 Lev. 133, *Nulmes v. Hobblethwaite*, S. C.

(d) 3 Lev. 133, *Nulmes v. Hobblethwaite*.

(e) 6 Mod. 52. Holt's Cases, 3.

the plaintiff was bound to prove it; and so it is at this day. A later authority has given weight to these decisions, so that the principle of not stating the mill to be ancient, is now fully recognised. The plaintiff was a miller, and he claimed a prescriptive right to certain water, which had been accustomed to flow to his mill; but he did not allege his mill to be an ancient mill. The defendant was charged with keeping a hatch-dam, or mill-head, at a much greater height than he had been accustomed, so that the water was obstructed from flowing in its usual channel; and, on the contrary, quantities of the water and stream were penned and forced back against the wheel of the plaintiff's mill, to his great damage and inconvenience. It turned out in evidence, that the old mill had been burnt down, and the plaintiff had built the mill in question with a wheel of the same dimensions, and on the same level, with the former one. Since that time, he had erected a new wheel of different dimensions, which required less water. The level of the water, however, continued the same. The action was brought for an injury to this last wheel. The learned Judge nonsuited the plaintiff on these grounds: first, because he had not enjoyed his mill, in the state it then was, for twenty years; and, secondly, because, by altering the nature of this \*wheel, the evidence of his right was gone. A rule was obtained [\*262] for setting aside this nonsuit, and the Court were quite clear, that the alteration of the wheel made no difference in the case. The water had been prevented from escaping as it had been accustomed, and thereby the owner of a mill, higher up the stream, had been prejudiced. There was no proof, that the proprietor of the lower mill had received any injury in consequence of altering the wheel; indeed, the old wheel drew more water than the new; and if a mill-owner were bound to use water at all times in the same precise manner, there would be a stop to all improvements in machinery. Had the plaintiff asserted in his declaration, that his mill, which was damaged, had been of a particular construction, the result might have been different; but he had shaped his complaint generally, and had proved himself to have been in possession of a mill, which was enough. Such were some of the observations which fell from the Bench, and the rule for a new trial was made absolute.(f)

This doctrine as to the alteration of the mill was not new; for it had long since been admitted, that the ownership of a mill, and the diversion of the water, were the principal matters required in proof. Thus in a case already referred to, it was said, that the proprietor might alter the mill into what nature of a mill he pleased, provided always, that prejudice should thereby arise, either by diverting or stopping of the water, as it was before; and that it should be intended, that the grant to have the watercourse was before the building of the mills, for nobody will build a mill before he is sure to have water; and then the grant of a watercourse being generally to his mill, he may alter the quality of the mill at his pleasure.(g)

(f) 1 B. & A. 258, *Saunders v. Newman*.

(g) 4 Rep. 87.

Nevertheless, it will be easily gathered from many of the foregoing observations, that the rule, as to obstruction, is capable of some qualification, and that it is not every diversion of a watercourse which will render the author of it liable to an action. And the opinion of Hale, C. J. above quoted, gives weight to this position, the inference from thence being, that where a person has been accustomed to turn a stream according to his pleasure, he may justify doing so, although it operate to the prejudice of another mill; for he would then have appropriated to himself a right, to the exercise of which a stranger could not justly object. If, therefore, a new comer should build in the face of an acknowledged right, it will be at his peril to do so.

[\*263] Further, it may be laid down, that an adverse possession of \*water for twenty years, however, obnoxious to the rights of parties lower down the stream, is *prima facie* evidence that the user has been at all events acquiesced in, and whether the millers lower down the river have built their properties before or after such an adverse possession, it will lie upon them to shew some good reason why they have not interfered sooner to stop the interruption. Cases of this sort have occurred, where parties higher up a stream than those whose rights they have been said to infringe, have been habituated to make diversions of the old channel, from time to time, for their own benefit. To do this successfully, they must have been permitted for twenty years to divert in that manner, or to obstruct, as the case may be, otherwise, the water lower down having been appropriated, the power they once possessed, as we have above explained, exists no longer.

It is no defence to say that the communication was originally ancient, if a change has been suffered for twenty years. An ancient ditch opened of old into an ancient stream; but the mill-owner kept the opening closed, without intermission, for more than twenty years. It was held, that he could not re-open the communication, notwithstanding the antiquity of it.(*h*) So again in the case of mines. The mine-owner discontinued the use of an artificial channel for twenty years, and another party succeeded to the use of the drainage water issuing therefrom, for a like period. Here the mine-owner could not resume his user to the injury of that other person after twenty years, in the absence of a custom. But, if a practice be proved for all mining districts to be governed by the same rule, namely, that a mine-owner must, of necessity, resume the use of his channel after a certain time, and moreover, that this fact is a matter of notoriety, the case might receive a different decision.(*i*) So, if a mill-owner work a ground-shot wheel with a low head of water, and then use a breast-shot wheel, which requires a high head, and if he then discontinue the breast-shot wheel, resuming the use of the ground-shot wheel, he will lose his right to the high head of water.(*k*) If two defend-

(*h*) 7 C. & P. 465, *Drewett v. Sheard*.

(*i*) 11 Ad. & El. 571, *Magor v. Chadwick*. S. C. 3 Per. & D. 367.

(*k*) 7 C. & P. 465, *Drewett v. Sheard*.

ants out the trench, and one only reopen it after it has been filled up, the jury will say, whether both did not concur in the reopening.<sup>(l)</sup>

There may also be a right to an easement on the land of another connected with the enjoyment of water for a mill. As where the defendant moved the plaintiff's fender and latch, \*which were on the defendant's land. The water escaped and did not flow, as before, [\*264] to the plaintiff's mill. Trespass was brought. The pleas, were,—not guilty, and that the fender was not the plaintiff's fender. Issue. 8. Thirty years' enjoyment of the use of the water, and a justification of the removal. Verification. Replication, *de injuria*. The verdict was for the plaintiff. The Court said, that this was a chattel separable from the soil, and that the plaintiff might be supposed to have a right to keep a fender on the defendant's land. It might have been an easement.<sup>(m)</sup>

Possession of water for more than nineteen years was shewn, upon a trial before Mr. Serjeant Adair, at Chester, the water having been diverted from its natural channel; and the learned Judge ruled, that nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a wear, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious.<sup>(n)</sup> A great case occurred soon afterwards. The plaintiff was a whitter, and had a watercourse in the Irwell, with which he used to work his mills and machinery; and he complained of the defendants for deepening and enlarging certain fenders and sluices higher up the stream, by which he occasionally had not water enough to carry on his business. It appeared in evidence, that the mills of the plaintiff and defendant were near together, and that both were supplied by the water of the River Irwell. Nearly a hundred years back, a wear had been made above on the defendants' premises, and the water had been brought from the river by means of a sluice. This was the *first* diversion of the river, and the water so obtained sufficed for the wants of the owner of the mill at that time. The remainder of the water flowed on in the accustomed channel. About forty years since another wear was built by the owners of the same premises, and about twenty years before the case under consideration arose, a third was made. No objection was interposed on these occasions, because sufficient water still remained, notwithstanding these diversions, there being, in fact no mill on the stream in that part of the country. In 1787, eighteen years before the action, the plaintiff's works were erected; his wear and sluice were lower down than the stream and between the defendants' mill and the tail of their sluice, where the water was again returned into the bed of the river, which there made a great bend. In 1791, P. and C., \*whose interest the defendants had [\*265] purchased, erected the wear, which was complained of. It was

(l) S. C. per Littledale, J.

(m) 8 Q. B. 913, Wood v. Hewett. But on the ground of the verdict being against the weight of evidence, the rule for a new trial was made absolute on payments of costs.

(n) 6 East, 213, Prescott v. Phillips, cor. Adair, Serjeant, C. J., of Chester, 1798, cited there. 1 Sim. & Stu. 203.

made above forty yards higher up the river than their own premises, and at the same time they enlarged their sluices so considerably, as to draw double the quantity of water from the Irwell, which had ever before been taken. This last wear, and the deepening sluice, occasioned at times an absolute stoppage of the plaintiff's works. The defendants went further—they attempted to exercise acts of exclusive occupancy; they put a lock on the clough, and for three years kept the key. But it was agreed between the plaintiff and defendants, that a person, paid by both parties, should be kept to watch the management of the clough, and that the plaintiff should have the water when it was not necessarily used by the defendants. This person, however, after the enlargement of the sluice, was desired by the defendants, in whose employ he was, to keep the plaintiff quiet. It was contended, that the plaintiff could not recover, for want of an adverse possession of twenty years; and that the defendants, having had an unlimited use of the water until 1787, could not by four years' forbearance (their new works having been erected in 1791) lose their right. It was, moreover, urged, that the action, if any, should have been brought against P. and C. and not against the parties who had purchased under them. Mr. Baron Graham put these points to the attention of the jury: that the plaintiff's works had been erected before the deepening of the defendants' sluice in 1791; that the plaintiff was thus in the enjoyment of so much of the water as had not been previously appropriated; that persons possessing land on the banks of rivers had a right to the flow of the water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use; that every such exclusive right was to be measured according to the extent of its enjoyment; and that the continuance of the damage by the defendants was a continuance of the original injury, for which an action lay against them. With respect to the key of the clough having been kept by the defendants, the learned Judge said, though strong it was not conclusive evidence against the plaintiff, for it might have been done under an ignorance, or a misapprehension of his rights. The jury found for the plaintiff, with nominal damages.

Two points were urged upon the motion for a new trial, upon the ground of a supposed misdirection by the Judge. First, that the evidence of exclusive enjoyment by the defendants from 1724 downwards, ought to have been left to the jury, as evidence of a conclusive right to the whole of the river water; and that any person who should build a mill [\*266] subsequently on the stream, must take the water, subject to the prior right of the defendants, and could not obtain any adverse title under twenty years' quiet enjoyment. Secondly, that there was evidence of an acquiescence in the defendants' claim on the part of the plaintiff. The Court discharged the rule, thus sustaining the plaintiff's right to the water.<sup>(o)</sup> Some of the observations, however, of the learned

<sup>(o)</sup> 6 East, 208, *Bealey v. Shaw* and others. This case was cited by *Holroyd J.*, 2 B. & C. 915. See 5 Esp. 56, *Strutt v. Bovingdon*.



Judges are too striking to be omitted in citing so remarkable a decision as the present.

By Lord Ellenborough: "The general rule of law, as applied to this subject, is, that independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land, without diminution or alteration. But an adverse right may exist, founded on the occupation of another. And though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long a time as may raise the presumption of a grant, the other party whose land is below, must take the stream, subject to such adverse right. I take it, that twenty years' exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of Parliament. But less than twenty years' enjoyment may or may not afford such a presumption, according as it is attended with circumstances to support or rebut the right."(*p*) And with respect to the acquiescence of the plaintiff, his Lordship said: "The plaintiff, to avoid litigation, agreed during that time to receive his right in a manner more abridged than he used to have done; but afterwards, when the attempt was made to take all the water from him, he stood, as he lawfully might, upon his strict rights, and brought his action for the obstruction."(*q*) As to the latter point, of the plaintiff's acquiescence, Mr. Justice Lawrence said: "In a case of doubt concerning the right to a thing, leave asked by one party of the other for the use of it, would be strong evidence of the right; yet here there is clear evidence of what the right was down to that period," &c.(*r*) "The true rule," said Le Blanc, J., "is, that after the erection of works, and the appropriation by the owner of the land of a certain quantity of the water flowing over it, if a proprietor of other land afterwards take what remains of the water before unappropriated, the first-mentioned owner, however he might, before such second appropriation, have taken to himself so much more, [\*267] cannot do so afterwards."(*s*)

This case has been detailed at a greater length than usual, because it illustrates two very important principles respecting possession. First, it shews that an enjoyment of water, adversely to the right of another person, must have existed for twenty years at the least; but, secondly, that where water has been left unappropriated, no such length of time need elapse before the person who possesses himself of that water can bring an action for an injury done to his newly-acquired right.

"The right to the use of water," said the Vice Chancellor, (Sir John Leach,) "rests on clear and settled principles. *Prima facie* the proprietor

(*p*) 6 East, 214. (*q*) *Id.* 216. (*r*) *Id.* 218.

(*s*) 6 East, 219. This opinion of Mr. Justice Le Blanc was cited with approbation by Holroyd, J., some years afterwards. 1 B. & A. 261. See also 1 Sim. & Stu. 201. S. P. 2 Cr. & Jer. 126, *Canham v. Flak*.

of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietor, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years; which term of twenty years is now adopted, upon the principle of general convenience, as affording conclusive presumption of a grant. It appears to me, that no action will lie for diverting or throwing back water, except by a person who sustains an actual injury; but the action must lie at any time within twenty years, when the injury happens to arise in consequence of a new purpose of the party to avail himself of his common right.<sup>(t)</sup>

This judgment of the Master of the Rolls was delivered upon an occasion when the Court refused to decree a specific performance "for, [\*268] amongst other purchases, that of a right to impound the water of a river, and to divert a stream from it, because the vendor had no such right as against some of the proprietors of land on the banks of the river."<sup>(u)</sup> And it was at first sustained in a subsequent case: where the Court of Queen's Bench held, that not only must there be an adverse enjoyment proved for twenty years against the right of another person; but, secondly, and contrary to *Benley v. Shaw*,<sup>(v)</sup> the same time must elapse before a party who has taken unappropriated water can be secure in his possession against a proprietor of water higher up or lower down the stream.<sup>(w)</sup> However, a new trial being granted the Court subsequently held, that although the first occupant of running water for a beneficial purpose has certainly a good title thereto, so as to defend himself against the owner above, or the owner below, yet he does not acquire such an exclusive right as to deprive the other owners of it, merely because he has anticipated them in a useful purpose. Unless, indeed, there were an adverse possession for twenty years.<sup>(x)</sup>

And now, by 3 & 4 Wm. 4, c. 71, s. 2, no claim which may lawfully

(t) 1 Sim. & Stu. 203. Nevertheless, it seems, that Parke, B., deemed the report to be inaccurate as to this opinion, attributed to the Master of the Rolls, of conclusiveness after twenty years. 1 C. P. Coop.; Ch. Pr. Ca. 330.

(u) 1 Sim. & Stu. 190, *Wright v. Howard*. Bill for specific performance, *Howard v. Wright*. Cross bill, that agreements might be delivered up to be cancelled.

(v) 6 East, 208. (w) 3 B. & Adol. 304, *Mason v. Hill*.

(x) 5 B. & Adol. 1, *Mason v. Hill*. Whether such a diversion might be made where the water is used for a profitable purpose, the Court would not decide. But they referred to *Palmer v. Keblethwaite*, 1 Show. 64. *Glynn v. Nicholls*, 2 Show. 507.

be made at the common law by custom, prescription, or grant to (amongst other things) any easement or watercourse, or the use of any water, after an enjoyment for twenty years, shall be defeated or destroyed, by shewing only that such watercourse, &c., was first enjoyed at an earlier period than twenty years. Nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated. And where the enjoyment shall have lasted for forty years, the right shall be deemed absolute, unless there be proof that the enjoyment was by some consent or agreement, made by deed or writing. The 3rd section enacts, that these respective periods are not to be counted, if an action or suit be previously instituted, and that, in order to raise this question of interruption, there must at least be one year's notice on the part of the person so interrupted. The 5th section allows of a general allegation of right in an action upon the case, as at present, and, in trespass, allows the defendant to state his claim for twenty or forty years, as it may happen. The 6th section does away with the presumption of grants. The 7th \*section provides for the cases of infants, and persons labouring under [\*269] incapacities. By sect. 8, when any land or water upon, over, or from which, any such easements, watercourse, &c., shall have been enjoyed or derived, shall have been or be held for life, or for any term exceeding three years from the granting thereof, the time of the enjoyment of such way or other matter during the continuance of such terms, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next, after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof.

The principle of considering that there may be a property in unappropriated water, although enjoyed for less than twenty years, has been recognised since this act of 2 & 3 Wm. 4. c. 71. An action was brought for disturbance of water.<sup>(y)</sup> The owners of a colliery had suffered the water pumped out of their colliery to flow along an artificial channel, so as to divert the water from the plaintiff's mill. This mill had been erected within twenty years before the action. There were mill-owners above the mill of the plaintiffs. The damage complained of was not great, for the water returned again to the plaintiff's use, less only by five per cent. by evaporation. And the nuisance caused by the pumping, (which was a pumping of soap suds,) was found to have polluted the water above the plaintiff's mill, belonging to other mill-owners, and to have caused little or no damage to the plaintiffs.

Upon these facts it was held, that in the absence of a grant or prescription an action lay by the owner of the land through which the water had been accustomed to flow against an owner of land above, and through

(y) The pleadings were as follows:—1st count. Disturbance of water. 2nd, 3rd and 4th counts. The like in various ways. Pleas 1. Not guilty. 2. To 1st count, not possessed. 3. To 1st count, denial of right of enjoyment. 4. To 2nd count. Not possessed. 5. To 2nd count. Denial of enjoyment. 6 and 7. The like to 3rd count. 8 and 9. The like to 4th count.

whose land the sough likewise passed, for diverting such water. For the owners of the colliery thus getting rid of a nuisance to their lands, by discharging the water into such sough, could not be considered as giving it to one more than to others of the proprietors of the land through which such sough had been constructed, but each might take and use what passed through his land. So that the proprietor of the land below had no right to any part of the water until it had reached his own land, nor had he any right to compel the owners above to permit the water to flow through their land for his benefit. Whence a diversion from the usual channel might prove to be a serious detriment to the plaintiffs.

[\*270] And \*judgment was given in their favour accordingly.<sup>(z)</sup> Nevertheless, it was admitted that no action would lie for diverting an artificial watercourse, where the enjoyment has not been of a permanent character, and where the interruption proceeds from some person standing in the light of the grantee. Although with reference to the small amount of damages, the Court said, it appeared sufficient to warrant a verdict for the plaintiffs upon not guilty, and the general issues tendered in this case by the defendants.<sup>(a)</sup>

(z) The verdict was for the plaintiffs, damages 1s. on each count. And the judgment was finally entered thus:—For the plaintiffs, as to so much of the 1st issue as related to counts 1, 3 and 4. For the defendants, as to so much as related to count 2. For the plaintiffs, on the 2nd, 3rd 4th, 5th, 6th and 8th issues. For the defendants, on the 7th and 9th issues. The first question was, how the issue on not guilty, as to counts 1 and 2, framed to recover for obstructions to the natural watercourse, Bowley Beck, should be disposed of. By the Court.—The verdict must be for the defendants on the plea of not guilty to the 2nd count; and for the plaintiffs, as to so much of the general issue as relates to the diversion of the water. The only question remaining would be, whether the remainder relating to the fouling of the water, should be entered for the plaintiffs or defendants. The jury found the fouling, and that the works had been erected within twenty years, but no actual damage had been done. By the Court.—We think the plaintiff has sustained damage in point of law. The defendants had not enjoyed user for twenty years. The verdict to be entered for the plaintiffs on every part of the plea of not guilty to count 1. Second; how the verdict should be entered on the 2nd and 5th issues. These issues arose on the traverse of the plaintiff's right to the watercourse, "*by reason of the possession of the mills.*" The defendants denied the right of the plaintiffs, because of a user less than twenty years as at present. The plaintiffs said, that, at all events, they might have an entry for so much as related to the law found for them. The Court assented and cited *Ricketts v. Salway*.† The entry would be special. The defendants cited *Frankum v. Lord Falmouth*.‡ But the Court said, that there the claim appeared not to have been to the flow of the river in its *natural course*, but to an easement enjoyed of damming the water back in *alieno solo*, and as the mill was not twenty years old, the claim could not be established. 3. As to Bowling Sough and Low Moor Sough, these were artificial and underground. If they had been above ground, the plaintiffs could not recover, and *per Cur.* "We think they cannot recover in this case." The issues on pleas 7 and 9 to be entered for the defendants. 4. Whether there should be a verdict for the plaintiffs on the plea of not guilty to count 3. The defendants said that the injuries were too trifling. But still there was a sensible diminution of water, and for so much the Court ordered the verdict to stand for the plaintiffs.

(a) 18 L. J., Exch. 305, Wood and others v. Waud and another. S. C. 3 Exch. 748.

† *Ricketts v. Salway*, 2 B. & Ald. 360.

‡ *Frankum v. Earl of Falmouth*, 2 Ad. & El. 452. S. C. 4 Nev. & M. 330.

But the rule above adverted to, as to an adverse possession, does not apply to obstructions in a *public navigable river*. In such a case, if the impediment offered to navigation should \*have existed for a season far beyond twenty years, no private right can demand its continuance, for a nuisance can never be legitimated. Thus, the plaintiff was a miller, having the advantage of a certain stream which supplied him with water for the working of his mill, and he brought his action against the defendant for deepening a ditch or channel above his mill, whereby great quantities of water were diverted, which would have otherwise flowed to his mill. The defendant, it appeared on the trial, was a barge owner, and had a wharf higher up the river than the plaintiff's premises were situate. Between their respective properties was the ditch or channel which had been widened; it connected the river on which the plaintiff's mill and the defendant's wharf stood, with another river. In order to enable his barge to pass to the plaintiff's mill, the defendant had deepened the ditch, and from that time the plaintiff's mill had ceased to gain its usual supply of water. There was contradictory evidence as to the ditch being navigable for barges. The learned serjeant, (b) who presided, said, that whether the river were navigable or not, each party must use the water in the same state in which it was found to be for the space of twenty years invariably, and that a certain benefit so long enjoyed could not afterwards be disturbed. The jury found for the plaintiff. But the Court were of opinion, that the direction of the Judge at the trial could not be supported; that if it were admitted that this river was a public navigable river, an obstruction of twenty years could not have the effect of preventing his Majesty's subjects from using it as such. The rule was, therefore, made absolute for a new trial. (c) It was said, in the last case, by a very learned Judge, (d) that "an act of Parliament is the only means by which such a public right can be determined;" (e) but we shall see in a future page, (f) that upon another occasion, Mr. J. Holroyd felt desirous of correcting that opinion, being satisfied of the existence of other modes of extinguishment. Still, however, the position that twenty years' adverse possession by an individual will not affect the public right, remains unimpeached.

An act of Parliament of course introduces a change in the relation between parties. A miller was plaintiff, and a railway company defendants. The defendants carried on their works under the authority of an act of Parliament, and they proposed \*to cross a mill stream by a bridge whose support in the centre was to be by two piles, sixteen feet apart. The bridge was to be six feet high above the level of the water. The owner complained that this was an insufficient height for the passage of barges, inasmuch, as the piles would impede the flow of water and the working of the mill. Engineers on both sides made affidavits, and the Vice Chancellor dissolved the injunction which had been obtained,

(b) Lens,—at Essex Summer assizes, 1818.

(c) 2 B. & A. 662, Vought v. Winch. 7 East, 199, by Lord Ellenborough.

(d) Sir G. S. Holroyd.

(e) 2 B. & A. 670.

(f) Post, Chap. X.

refusing, however, to give costs. Upon appeal to the Lord Chancellor, his Lordship desired time to look into the affidavits, observing, that very great care must be taken to prevent damage to the plaintiff's mill. He recommended that an eminent engineer should give an opinion upon the subject, and point out how the defendants could construct their works without damaging the plaintiff's rights, and directed that the case should be mentioned again. The matter was afterwards compromised.<sup>(g)</sup> It is not an answer to say that compensation for damage to property is awarded by the act, and, therefore, an injunction was granted to restrain a company from erecting an arch of less than a certain dimension over a mill-race, which, if greater, would not injure the mill, but which would work injury according to the plan proposed. The building of the arch proposed, would have damaged the mill-race, but by enlarging the arch no such injury would have been occasioned.<sup>(h)</sup> Nor is it any answer, that the company having diverted water so as to disturb the works of a coal mine, restored the brook to its former level, especially if they neglect to allege that the damage has been cured. The plaintiff has a right to have the opinion of a jury, and as the damage had been done in part under the powers of a statute, the Court held that a mandamus was the proper remedy.<sup>(i)</sup>

Still the party is not to take advantage of an act Parliament concerning cleansing to make a drain upon his land, so as to injure his neighbour. Thus, under an inclosure act, certain drains were set out, and the owners or occupiers of the land over which the drains passed were directed to do certain cleansing, and keep their drains of sufficient width to carry off the water which might run down them. The plaintiff made a slough or under drain on land, which caused an increased quantity of water to pass into one of the awarded drains. It was held that he could not justify this act.<sup>(k)</sup>

[\*273] \*We have just seen, that the use of the right of a public navigable river cannot by possibility be deemed an obstruction of a private watercourse. And that cannot be construed to be an impediment so as to create a right of action, which is unattended by damage to the party complaining. Thus the plaintiff declared, that by reason of his possession of a messuage, &c., he was entitled to the benefit of a certain stream; but that the defendant had erected a dam across the stream, higher up than the plaintiff's tenements, so that the water, instead of running in its regular course, rushed violently against the plaintiff's banks, washing away, damaging, and destroying his lands. At the trial the jury found that this dam had not created any injury to the plaintiff's lands, as he had

(g) 2 Railw. Ca. 380, *Manser v. The Northern and Eastern Railway Company* and another.

(h) 1 Russ. & Myl. 181, *Coats v. Clarence Railway Company*.

(i) 2 Railw. Cas. 1, *R. v. North Midland Railway Company*. S. C. 11 Ad. & El. 955, note.

(k) Man. & Gr. 354, S. C. 8 Scott, N. R. 56, *Sharpe v. Hancock*.

represented; but they added an opinion, that the defendant should not stop the water during the summer. It was insisted, that this finding gave the plaintiff a right to the verdict, because the water had been stopped in the summer. But Mr. Baron Graham, considering that the plaintiff's complaint had been, not of a want of water, but that the water had been so pent up as to injure his banks, by its subsequently impetuous flow, which injury the jury had negatived, directed the verdict to be entered for the defendant. And the Court upon a motion to enter the verdict for the plaintiff, entertained the same opinion. If the plaintiff had always as much water as he wanted for his purposes, the defendant could be guilty of no wrong in preventing additional water from coming to the plaintiff's premises. He should have shewn the loss of some benefit, or the deterioration of the value of his premises; and with regard to the mischief occasioned to his banks, the jury had said, that no such damage had occurred.<sup>(l)</sup> The rule was therefore discharged.<sup>(m)</sup>

So in the case of an injury to church lands. Where a rivulet was penned back upon a vicarage house garden by a headstock, Heath, J., held, that although in any other case the possession of the headstock for twenty years would have been evidence of a grant by deed, yet that in the case of church lands it was different. The learned Judge called upon the defendant to shew that no injury had been done to the garden, which being done, the defendant had a verdict. Upon a motion for a new trial, the Court sustained the ruling, observing, however, that a case of the same kind might happen where there might be evidence to go to the jury of there having been an ancient headstock.<sup>(n)</sup>

\**A fortiori*, if the plaintiff prescribe generally for a watercourse, [\*274] and it turn out in evidence that the water has not always run to the plaintiff's house, but that it has been usually dried up in the summer, or drank by the defendant's cattle, the plaintiff would fail in his prescription.<sup>(o)</sup>

However, where the plaintiff's title comes in question, the case will be different, although no injury may have been done. As where the defendant erected a bridge and tunnel just below an accumulation of mud in a drain which lay between the plaintiff's close and the defendant's works. Here it was proved that the mud had for sixteen years been so considerable, that no barge could pass along, and therefore it was contended that the plaintiff had sustained no injury. But the Court held, 1st, that as this was a navigable river, the plaintiff's way from the river to his own close had been entirely obstructed by the tunnel; and, 2ndly,

<sup>(l)</sup> The banks were in fact, in a bad condition, in consequence of the plaintiff's neglect to repair them.

<sup>(m)</sup> 2 B. & C. 910, Williams v. Morland. S. C. 4 D. & R. 563.

<sup>(n)</sup> 3 Smith, 316, Wall v. Nixon.

<sup>(o)</sup> By the Court in Murgatroid v. Law. Carth. 117. Whether the sinking of a well, so as to injure the flow of water to a neighbouring well, be a legal wrong, quære? 10 Sim. 551, Hammond v. Hall.

that the erection of the bridge and tunnel was an immediate injury to the plaintiff by putting his right into hazard, and preventing the actual enjoyment of it whenever he might think fit, and the rule for a new trial was made absolute in the plaintiff's favour. (p)

The cleansing of a watercourse is, for the most part, not an obstruction. This was the opinion of Lee, C. J., in the case of digging pits, which has been already quoted; the learned Judge observing, that although the defendant could not be warranted in enlarging ancient channels, he might, nevertheless, have cleansed the pits in question, without subjecting himself to any action. (q) Indeed, on the contrary, a neglect to keep up due repairs and cleansing, will subject the offending party to an action. An action upon the case was brought against the Corporation of Lynn, for the non-repair of a creek or fleet, into which the sea was accustomed to flow and reflow, as from time immemorial the corporation had been used to repair. It was alleged, that the creek became unnavigable through this neglect, so that the plaintiff was obliged to make a circuitous route, in order to carry his corn. Judgment passed against the corporation by nil dicit and damages were awarded upon a writ of inquiry. Error was then brought, and after the Court had overruled the first objection regarding the right, to which we have adverted in a former Chapter, the counsel for the corporation urged, that it was incumbent on the defendant in error to shew [\*275] \*a special reason or tenure for this cleansing, inasmuch as the corporation were not bound of common right. But Lord Mansfield said, that the allegation of repair from time immemorial was sufficient. The declaration stated a prescription, and such repair might be the very condition and terms of their creation or charter. (r)

The Legislature has enacted, that the surveyor of the highway shall be at liberty to get materials for the repair of the road under his management, out of any river or brook within the parish, township, or place where he shall be surveyor, or within any other parish, if there be not sufficient materials within his own parish, provided that he do not interrupt the course of such river or brook, nor dig nor get the same out of any river or brook within 150 feet above or below any bridge nor within the like distance of any dam or wear. (s) This statutory provision having been already mentioned at length in a recent page, (t) we need not say more than to remind the reader, that it embraces private as well as public rights of water.

We proceed now to mention the various remedies which may be had

(p) 1 Bing. N. C. 549, *Bower v. Hill* and another.

(q) 1 Wils. 174, *Brown v. Best*.

(r) Cowp. 86, *The Mayor of Lynn v. Turner*. So again, it was said, that if one were bound to scour a ditch, where the water ran, and he neglected so to do, an action of trespass lay. 11 H. 4, 83. See 8 H. 7, 5. Clayt. 96, *Ward v. Metcalfe*. 2 Lutw. 1515, *Morgan v. Evans*. Moo. & Malk. 404, *Lord Egremont v. Pulman*: where the defendant was held liable to the reversioner in case, for the nonrepair of a gutter, although the mischief had been occasioned by the wrongful act of the reversioner's tenant.

(s) 5 & 6 W. 4, c. 50, s. 51.

(t) P. 205.



for obstructing watercourses, or withholding the use of them from their rightful owner.

The principle actions which suitors formerly had recourse to upon these occasions were: the old assise of novel disseisin, the assise of nuisance, trespass, and the action upon the case. The assise lay for him who was tenant of the freehold against a freeholder, but as the action on the case has since superseded the real writs, which are now abolished,<sup>(u)</sup> it seems hardly necessary to enter upon the old learning which so carefully confined the assise as well to persons who had the freehold, as to things appendant or appurtenant thereto.<sup>(v)</sup> It was, however, said in very early times, that if I have a watercourse over my land, and a stranger come thither, and make a trench, by which he turns the water, there might be an assise of nuisance, or I might proceed by trespass or assise of novel disseisin.<sup>(w)</sup> In more modern days, \*trespass and case have been the most ordinary remedies, although, as we shall see presently, difficulties have arisen upon some occasions as to the proper use of these actions respectively in particular cases.<sup>(x)</sup> Persons injured may, moreover, proceed by abatement, provided that no breach of the peace be created in so doing. And by claiming the property as so much land covered with water, ejectment will lie for the recovery of a watercourse. [\*276]

Before, however, we come to consider each of these methods of redress in their order, it should just be remarked, that as a watercourse is a private right, an indictment will not lie for disturbing it.<sup>(y)</sup>

With respect to the action of ejectment, it will not lie for a watercourse, or rivulet, *as such*, because the sheriff cannot give possession of a thing which is for ever running.<sup>(z)</sup> Error was brought on a judgment given in the county of Carmarthen, because ejectment had been maintained there *de aquæ cursu*, and it was reversed by the unanimous opinion of the Court.<sup>(a)</sup> But it was said, that such an action would lie for a gorge<sup>(b)</sup> or pool,<sup>(c)</sup> and it may also be sustained in respect of a pool, or pit of water, because those words comprehend both land and water.<sup>(d)</sup> Should the land under the water or river not belong to the plaintiff, but the river only, he must then bring an action upon the case for any diversion of it, and may not proceed otherwise.<sup>(e)</sup> The perpetual flow of the stream is a reason, as we shall shew in the next Chapter, why a watercourse cannot be extinguished by unity of possession.<sup>(f)</sup>

In old times, an assise lay for narrowing the course of a stream:<sup>(g)</sup> for straightening the flow of water to a mill, so that it could not work, nor

(u) By 3 & 4 W. 4, c. 17, s. 36.

(v) See Vin. Ab. Nuisance, 27 (H.)

(w) 32 Ass. pl. 2. 2 H. 4, 11; but see 13 H. 7, 26.

(z) See 3 H. 4, 5. Bro. Trespass, pl. 78, cites S. C.

(y) 14 Vin. Ab. 394, Smith's case.

(x) See Adams on Ej. p. 20.

(a) Yelv. 143, Challenor v. Thomas. S. C. 1 Brownl. 142.

(b) A wear.

(c) Yelv. 143. 1 Brownl. 143.

(d) Co. Litt. 5 (a). Adams, p. 20.

(e) 1 Brownl. 143. Yelv. 143.

(f) Chap. X.

(g) 48 Ass. pl. 4. 48 E. 3, 27.

the water empty itself so readily as it had been accustomed ;(*h*) for diverting the greater part of a course of water ;(*i*) for straightening water, so as to prevent a mill from grinding so regularly as it had been wont ;(*k*) [*\*277*] and for \*many other similar nuisances. So with respect to conduits it was said, if a man stop my conduit, I shall have an assise of nuisance ;(*l*) but as we have above said, these writs of assise are at an end.

The real action of quod permittat, now also abolished, was once very available for the purpose of recovering rights of water.

So, again, *præcipe quod reddat* lay for an acre of ground covered with water.

The action upon the case has long been resorted to in cases of consequential injury by reason of the obstruction of these rights. It was, however, of early origin. Thus, the plaintiff had immemorially a mill in T., to which the water flowed from a neighbouring vill; the defendant made a trench to let the water out of its course, and the Court held, that the action would lie.(*m*) So where there was custom for the inhabitants of Southwark to have a common watering place for their cattle; it was held, that any inhabitant of Southwark might have an action against the defendants for stopping it up.(*n*) It is true, that upon occasions subsequent to this decision, it was determined, that case would not lie where assise or quod permittat might be brought ;(*o*) but it is sufficient merely to state, that these distinctions have long since been overruled.

Indeed, the difficulty which is now occasionally felt, arises from a question whether case or trespass be the proper remedy. The objection, however, applies to individual cases, for the general rule is clear, that where the damage does not immediately result from the act complained of, it is consequential, and then case is the proper remedy; on the contrary, where the act itself, and not the consequence of it, occasions the mischief, trespass is the right action.(*p*) Thus, if a person pour water upon his neighbour's land, the injury is immediate, and the aggrieved person brings trespass; but if he stop a watercourse upon his own land, or place a spout in such a direction as to damage the land of another, these latter acts produce consequential mischief, and the party should sue his action on the case.(*q*) The defendant caused water to overflow the plaintiff's fishery, by throwing down a weir in the plaintiff's close,

(*i*) See F. N. B. 184 (B.)

(*h*) 48 Id. pl. 4.

(*k*) 9 Ass. pl. 19. Bro. Assise, pl. 145, cites S. C. Bro. Accion sur le Case, cites S. C.

(*l*) 14 H. 8, 31. Bro. Nuisance, pl. 13.

(*m*) 21 H. 7, 30. Bro. Accion sur le Case, pl. 71.

(*n*) Co. Litt. 56, Westbury v. Powell. S. C. cited in Cro. El. 664.

(*o*) See Cro. El. 520.

(*p*) See Chit. on Pleading, ed. 1834, vol. 1, pp. 140, 141.

(*q*) See Id. 126.

where \*the defendant was a trespasser, and trespass was brought. There was also a count in case, and it was urged, that this was [\*278] not a trespass, and that trespass could not be joined with case. The Court assented to the latter objection, but were of opinion that the act complained of was a plain trespass.(r) On the other hand, where the defendant dug ditches, and so diverted the plaintiff's water out of the rivers, and damaged the meadows of the plaintiff, an action upon the case was brought; and it was moved to arrest the judgment, because it had not appeared in evidence that the diversion of the water was consequential to the digging of the ditches, and thus that trespass was the proper form. But the Court said, that the injury should be intended after the verdict to have been consequential.(s) It appears that the Court held the action on the case to have been the proper remedy upon this last occasion.(t) And it was deemed unnecessary upon such an occasion to aver that the water had run time out of mind, for if it had run but one year, so as to drown the plaintiff's lands, the action would lie.(u) So where one had a right to enter the yard, of another, and fixed a spout there which discharged water upon the plaintiff's land, it was held, that case, and not trespass, should have been brought, and judgment was given for the defendant.(v)

The action on the case is also the proper remedy for the proprietor of a house whom it annoyed by the continual dropping of water from an adjoining dwelling. Thus, upon such an occasion, a feoffment was made of the new house, and the only question was whether an action would lie against the new feoffee for a continuance of the nuisance. The Court held that it would.(w) So where the defendant erected a cornice upon his house, so that the rain water flowed from the cornice into the plaintiff's garden adjoining, and damaged the garden; it was held, that an action lay, and that the cornice was a nuisance from which injury to the plaintiff might be inferred. And proof that rain had fallen between the time of the erection of the cornice, and the commencement of the action was deemed unnecessary.(x) So an action of a similar nature was held to lie against a party for continuing a bank, so as to surround [\*279] the \*plaintiff's meadow with water. It appeared, that the bank had been raised before by the feoffee of the defendant, and the Court said, that a remedy might be had against an heir under such circumstances.(y) According to another report of this case, some doubts seems to have been entertained by two of the judges,(z) and, at length, after ad-

(r) 1 Lord Raym. 274, *Courtney v. Collett*. 12 Mod. 164. S. C. cited also 2 Sir Wm. Bl. 898.

(s) 11 Mod. 257, *Leveridge v. Hoskins*. See 2 S. C. 1 Str. 6 Burr. 1113.

(t) See 1 Str. 636. 2 Lord Raym. 1403.

(u) 1 Vin. Abr. 557, *Smith v. Babb, Gawdy, J.*

(v) 2 Lord Raym. 1399, *Reynolds v. Clarke*.

(w) Mo. 353, *Rolfe v. Rolfe*, cited there in *Beswick v. Combdon*. S. C. cited in 5 Rep. 101.

(x) 1 C. B. 829, *Fay v. Prentice*. 14 L. J., C. P. 298.

(y) *Ibid.* *Beswick v. Combdon*. Id. 449.

(z) Cro. El. 403.

journing the case, the judgment was given for the defendant, upon the ground that assise of *nuisance*, or quod permittat, should have been brought.(a) This latter difficulty is now entirely got rid of, and the opinion of the Court, according to the report in Coke, viz.—that the defendant having kept and maintained the bank as he found it, had not done any offence, and that if it were a nuisance before his time, it would be no offence in him to keep it,(b) cannot now be considered as law.

The defendant's husband in his lifetime fixed a small pipe and cock into a main pipe, and thus diverted a watercourse from the house of the plaintiff. After the death of the husband, the wife continued the nuisance, and it was held, that an action lay against her.(c) The action upon the case may also be employed where an obstruction has arisen in consequence of the neglect on the part of another person to do repairs. And thus, in the case against the Corporation of Lynn, which has been already cited, the defendants were obliged to submit to damages, for their omission to cleanse a creek, in consequence of which the plaintiff was compelled to carry his corn round about.(d)

With respect to parties in possession or reversion, it had been held, that in an action for stopping a rivulet, and drowning the close, and so spoiling trees, case was the proper remedy for the reversioner, and trespass for the tenant in possession. For the reversioner could not have trespass in respect of injury to the possession.(e)

In alleging a right to take water, care must be employed to shew that the obstruction complained of, is properly connected with the right. The plaintiff complained that the defendant had locked up a door-way, so that the plaintiff could not come \*to his cistern. Issue was [\*280] taken on the right, and a verdict found for the plaintiff. But judgment was arrested, for non constabat, that the plaintiff had any right to go through the door-way.(f)

If a man cannot have access to cleanse his gutter, because the defendant has thought fit to stop up a passage, an action on the case will lie, but a prior request to the defendant for that purpose should appear on the record. After verdict, however, that request will be presumed.(g)

So much has been said as to the diversity between the actions of trespass and case, that the mere mention of the former as a remedy for immediate injuries to rights of water, may be sufficient.

(a) Cro. El. 520.

(b) Ibid.

(c) Dy. 319, Moore v. Dame Browne.

(d) Cowp. 86, the Mayor of Lynn v. Turner, in error from a judgment of the Court of Common Pleas. The judgment was affirmed. S. P. 45 E. 3, 17. Bro. Accion Sur le Case, cites S. C. pl. 20.

(e) 3 Lev. 209, Biddlesford v. Onslow.

(f) 6 Ad. & El. 786, Tebbutt v. Selby. S. C. 1 Nev. & P. 710.

(g) 1 Mod. 27, Tomlin v. Fuller, S. C. 1 Vent. 48. 2 Keb. 575, 583.

An action of covenant also will lie for obstructions, where the circumstances of the case will warrant. It was held, in a case concerning a watercourse, that the devisee of an equity of redemption, (the legal estate being in a mortgagee,) was not liable in covenant, as assignee of all the estate, right, title, and interest of the original covenantor. The Corporation of Carlisle sued the defendants in covenant, for that one G. D. had bargained and sold to them, for certain considerations, so much of the River Caldew, running through his lands called D. Holme, as should be sufficient for the grinding of corn at all times at the city mills. There was a covenant that G. D., &c. should not divert or obstruct any part of the water so granted. It was then alleged, that all the estate, right, title, and interest of G. D. in the said lands, &c., came to and vested in the defendant by assignment. The breach was, that the defendant erected a wear across the River Caldew, near the city mills, and higher up the stream, and so had diverted the water whereby the mills had become less serviceable. The defendants, amongst other pleas, said, that the estate did not come to them by assignment, &c. It was objected on their behalf at the trial, that the action was improperly brought against them as assignees of *all the estate*, &c. of G. D., the same being vested in one W. as mortgagee in fee, while the defendants were only seized in the equity of redemption, as devisees in trust under a will. The learned Judge being of opinion that the plaintiffs had failed in their averments, directed a nonsuit, and the Court of King's Bench subsequently confirmed his opinion. They held it to be quite clear, that the devisees of an equitable estate (the only character to be ascribed \*to the defendants upon the record) could not be liable to an action of covenant as assignees. (h) [\*281]

Lastly, a person aggrieved by obstructions such as we have above spoken of, may redress himself by abating the nuisance, provided, at the same time, that it be done without tumult or a breach of the peace.

Thus if a man make a ditch in his land, by which the water, accustomed to run to my mill, becomes diminished, I am at liberty to fill in the ditch, and the entry upon the land of the aggressor was said by Littleton to be congeable, or allowable for that purpose. (i) So also in the converse is this case. For if water run over the land of another, and he so stop it in his course, as that it surrounds my land, it is competent for me to abate the obstacle which hinders the escape of the water. (k) And thus again, if water running near to a vill should by any means be checked in its flow, each inhabitant is empowered by law to destroy whatever impediment there may be, because the town would otherwise be inundated. (l) And, on the other hand, if a lawful watercourse be impeded,

(h) 8 East, 487, Mayor, &c. of Carlisle v. Blamire and another. Whether a covenant not to sell or dispose of water from a well to the injury of the proprietors of certain waterworks, their heirs, executors, administrators, and assigns, ran with the land so as to bind, as well as be enforced by assignees, was made a quære. A demurrer was allowed in equity, and the parties were remitted to their rights at law. 16 Ves. 454, Collinson v. Plumb.

(i) 9 E. 4, 35.

(k) 8 E. 4, 5.

(l) 9 E. 4, 35.

it is competent to the party injured quietly to abate the nuisance. Thus where the tenant of a house had a conduit for the purpose of conveying water thereto, which ran through the land of a copyholder, it was held, that he might dig the copyholder's land, for the purpose of amending his pipe.(m) So again the plaintiff had erected a dam for supporting a fish pond on his own soil, but this erection stopped a rivulet which the defendant enjoyed for the benefit of his cattle, and diminished the water, upon which he entered and abated the nuisance, and the Court refused to set aside a verdict in his favour.(n) However, the thing complained of cannot be abated until it actually becomes a nuisance; so that if one see his neighbour erecting that which it is probable will ultimately be such, it cannot be abated as long as it continues in an offensive state.(o) Moreover, if the person injured abate no more than is necessary, any damage [282] resulting from the act will \*not be laid to his charge. As where one erected a mill-dam, partly on his own land, and partly on the land adjoining; upon which the owner of the adjoining land pulled down the part on his land, and the whole dam fell down, and the water run out; it was held, that the owner was justified.(p) But where the plaintiff had a right to irrigate his meadow, by placing a dam of loose stones across the stream, and occasionally a board or fender, and he fastened the board with two stakes, which he had no right to do, the defendant was held liable in case for pulling down the board, as well as the stakes, although, as owner of the adjoining land, he had a lawful power to abate the latter.(q) On the other hand, if a barrier be removed, as in a mine, which prevented water from flowing into another mine, the owner may have an action, for it is the duty of the other owner to make provision against this inroad of the water. By removing a barrier of coal from his mine, he inflicted an injury upon his neighbour.(r)

Nevertheless, it must immediately occur to the reader upon this point, that a remedy by injunction is open to the person who is thus disadvantageously situated. A Court of Equity will judge, from the several affidavits on both sides, whether the thing in question will be injurious, and will discriminate between a malicious attempt to frustrate the prospects of the defendant by the injunction, and a well founded reason for apprehension.

However, it has been declared, that if a party look carelessly on whilst an injury is carried on, and he wilfully permit its accomplishment, his application to equity will be unavailing. Thus, upon the diversion of a watercourse, it appeared, that the plaintiff at law had been put to great expense by reason of the injury, but also that he saw the work whilst it was proceeding, and connived at it, by testifying his assent, rather than

(m) Mo. 644, *Guy v. Brown*; and see 39 H. 6, 32. Br. de son tort, pl. 43, cites S. C.

(n) 2 Smith Rep. 9, *Raikes v. Townsend*. (o) 12 Mod. 510. *Holt's Cases*, 499.

(p) Cro. El. 269, *Wickford v. Bill*.

(q) 6 Bing. 379, *Greenslade v. Halliday*.

(r) 2 Dowl. & L. 203; 13 L. J. Ex. 361, *Firmstone v. Wheeley*.

disagreement. Lord Somers, therefore, granted an injunction; for any continuance would in this case be a fresh nuisance, and so the party would be continually liable to actions, which would be unfair after the encouragement which the plaintiff at law had held out.<sup>(s)</sup>

This naturally leads us to consider the equitable remedies, applicable on these occasions. And it seems that an injunction will be granted where the parties have ascertained their rights at law, although the Court makes a great difficulty in granting it before, unless indeed, where new works are in progress upon an \*old possession. Thus, where a bill was brought, founded on the right of the mayor of the city of [\*283] London, to supply Southwark and other places with water, and an injunction was prayed against the defendant, to restrain him from raising engines, laying pipes, and breaking up the ground to the injury of the plaintiff's right, the Court allowed the demurrer to the bill. For the plaintiff should first try his legal remedy; and besides, this being a monopoly, there would be a good chance of his failing at law.<sup>(t)</sup> So where the plaintiff brought his bill as lessee of an ancient mill, and prayed that the defendant might be decreed to pull down certain flood-gates, and other works which he had erected, and be restrained from erecting new, the Court referred the party to his remedy at law. In this case the works had been erected for three years; and the Lord Chancellor said, that the Court might have interposed by injunction, had there not been laches, because these were new works upon an old possession, and it might also be had if the party should commit trespass after the trial. The demurrer to the bill was then allowed.<sup>(u)</sup> However, upon one occasion, where there had been a possession for sixty years, a bill was allowed to be maintainable against the mortgagee who had foreclosed an equity of redemption, although the right had not been established at law.<sup>(v)</sup> In general, however, the parties are remitted to their legal rights. As where an injunction was prayed by a miller to restrain the obstruction of a flow of water through the plaintiff's goit. The Court enjoined that there should be no nuisance, and directed an action at law. The case was tried before Taunton, J., when an agreement was produced which was construed unfavourably for the plaintiff, and he was nonsuited. But upon a motion for a new trial, it appeared that the plaintiff's rights had been acquiesced in for twenty-eight years, and the rule was made absolute. Upon the second trial, a juror was withdrawn, and two surveyors were appointed, who, however, made no award; upon which another new trial was ordered, unless a reference should be consented to. No agreement to be filed. The terms were these. The plaintiff to bring his action, and to admit that the defendants had not prevented the water from flowing to the same extent as when the plaintiff purchased. The defendants to admit that they had prevented the water from flowing beyond that extent, and to admit the agreement to be a grant, it not being under seal. The defendants

(s) 2 Eq. Ca. Ab. 522, pl. 3. Anonymous. (t) 2 Atk. 391, *Whitchurch v. Hide*.

(u) 1 Cox, 102, *Weller v. Smeaton*. S. C. 1 Bro. C. C. 572.

(v) Prec. Ch. 530, *Bush v. Western*; and see Id. 531, *The Duke of Dorset v. Girdler*. 4 Vin. Ab. 425, *Hilton v. Lord Scarborough*, in the case of a ferry.

[\*284] refused these \*admissions, and their motion was dismissed with costs; and a motion to dissolve the injunction was refused.(w)

An injunction was moved for on behalf of the commissioners for cleansing the Witham Navigation. The grounds alleged, was the probable danger to the bank of a river, from a steam engine used for cleansing a particular district.(x) So an injunction will be granted to protect coal mines from water which flows into a neighbouring colliery. But the Court refused to make the injunction *perpetual*, until the right had been established at law, and a year was allowed for that purpose.(y)

Mandamus is also a remedy, especially when the damage has been occasioned by a proceeding partly under the powers of an act of Parliament.(z) But, of course the party against whom the writ is issued, may shew that he has fully complied with the requirements of the act. As in a case where a company were required to make ponds for cattle to be watered.(a)

If the matter is left to arbitration, there must be no uncertainty in the award. There was an action for polluting a watercourse. The plaintiff had a verdict subject to arbitration. The award was, that the defendant should take all proper and reasonable precautions for preventing the water from being unfit for use, and he was to use a filtering process by the most ordinary and approved process. This award was held bad for uncertainty. It was not even stated by whose approbation the process was to be deemed the best.(b) The plaintiff had sued the defendant for improperly penning back the water of a weir upon the plaintiff's corn mill. The plaintiff complained that the defendant's water had been raised to an improper and unusual height. The matter was referred. The arbitrator was empowered to settle all disputes as to rights of water and depths of weir; and power was reserved to the Court to remit the award. The arbitrator directed that the defendant should maintain his weir at the depth of fourteen inches and no more. But he added, that, in order to perpetuate the depth, such durable marks and erections should be placed on the land adjoining the weir, as a certain surveyor should direct. Upon [\*285] \*a motion by the plaintiff for a rule to pay the amount of costs, the Court said that the award as to the weir was sufficiently certain, but that the direction as to the marks was a delegation; and as the defective portion of the award could not be separated under the power given to settle *all* disputes, the arbitrator was directed to reconsider the matter which he had left to the surveyor.(c)

(w) 1 C. P. Cooper Ch. Pr. Rep. 319, Dewhirst and others v. Wrigley and others.

(x) 3 Myl. & K. 169, Earl of Ripon v. Hobart and others.

(y) 6 Hare, 340, Duke of Beaufort v. Morris.

(z) 2 Railw. Cas. 1, R. v. North Midland Railway Company.

(a) 3 Railw. Ca. 764, York and North Midland Railway Company v. Milner. S. Q. 15 L. J. Q. B. 379.

(b) 6 Q. B. 730, Stonehewer v. Farrar.

(c) 19 L. J. Q. B. 329, Johnson v. Latham.



## \*CHAPTER X.

[\*286]

## OF EXTINGUISHMENT, SUSPENSION, AND REVIVOR.

It is not easy to conceive the extinguishment of maritime rights, which seem to be the inseparable privileges of every British born subject; but there are occasions, nevertheless, upon which such a cessation of original privileges will operate. For example, if the sea desert a shore where it has been accustomed to flow and reflow, the public right of passage is gone, and so also is the common fishery; for nature has willed to put an end to those rights, by taking away the subject of the right. So again, if the sea should swallow up the lands of a subject, but nevertheless, after a certain time, it again recede, leaving the soil dry; the rights of the people, which accrued upon this invasion of the sea, cease, because the water, which alone invested them with their power to come there, has departed. And so it is, that if the ocean again resumes its sway, the general license of traversing its waters will recommence, the common piscary will revive, and other rights which concern the general benefit will be again established.

An extinguishment, again, will be affected where the King grants a parcel of the soil of the sea, for the purpose of being embanked and cultivated; although, as we have seen, if the grant be not made available within a reasonable time, the right of the Crown will revive, and, by consequence, the original user of the subject.

There may likewise be an extinguishment of rights, or rather, of public privileges, in navigable rivers, as we shall see directly.

A right to take wreck may be extinguished under certain circumstances. We say a right, because that word imports an incorporeal hereditament, and it is vested in a subject; for when the soil of the sea either belongs or reverts to the Crown, it is not a right, but a part of the sovereign dominion. And \*thus, upon the general principle, which applies [\*287] to liberties, privileges, and franchises originally in the King's own hands, as parcel of the flowers of his Crown, if wreck, granted as an appendancy to certain possessions, come again into the royal power, it becomes extinct as an appendancy, and the King is seised of it *jure coronæ*.<sup>(a)</sup> And there is this distinction: liberties which a common person has by prescription or grant, and which if the common person have not, the King himself should have, throughout England, as waifs, estray, wreck, &c., shall be extinguished, if by forfeiture or otherwise they revert to the Crown; and then they cannot be had without a new creation. But those liberties which one may have by grant or prescription, and which the King, (if such prescriptions had not been,) could not have by his prerogative, as warren, park, fair, market with tolls, &c., are in esse,

(a) 9 Rep. 25.(b) 1 And. 87. Mo. 474. Cro. El. 592. See Palm. 78; and Co Litt. 121.

and do not determine upon the Crown regaining possession of them ; since, if the King should not have them by his means, they would be lost.(b)

Again, there may be an extinguishment of rights in a public navigable river. It may be effected by the writ *ad quod damnum*,(c) or by an act of Parliament, or by natural causes,(d) or perhaps by commissioners of sewers, if there be any appointed for the district, and they find that it would be for the benefit of the whole body.(e) Thus, with reference to the writ of *ad quod damnum*, it is said, that "if there be an ancient trench or ditch coming from the sea, by which boats and vessels use to pass to the town, if the same be stopped in any part, by outrageousness of the sea, and a man will sue to the King to make a new trench, and to stop the ancient trench, &c., they ought first to sue a writ of *ad quod damnum*, to inquire what damage it will be to the King or others." (f)

It was never doubted that an act of Parliament would operate to extinguish any public right of passage, whether by land or water, but commissioners under navigation acts must be cautious to act within the bonds prescribed to their jurisdiction.

Certain commissioners appointed by act of Parliament for the purposes of making the river at Wigan navigable, and of settling the differences between the undertakers and owners and occupiers of adjoining lands, made a decree, awarding \*certain damages as an indemnity for [\*288] injuries. This decree having been enrolled at the sessions, was brought into the King's Bench by certiorari ; and it was urged, amongst other things, that the commissioners had assessed damages, by reason of the towing paths, which were not within the act, as far as indemnity was concerned. And the Court said, that although they would always lean against formal objections, yet that all inferior Judges must set out enough in their proceedings to found their jurisdiction. Here the commissioners had confounded two clauses ; the first directing an absolute satisfaction for land taken, and which included the towing path, and the second relating to the awarding of damages, and which did not embrace those towing paths. The decree was therefore reversed.(g)

Lastly, concerning the cessation of such a right as the above from natural causes, it was very early held for law, that if a channel used by the public might happen to alter its course, the general right extended whithersoever the channel should run, and, at the same time, that the old right ceased. So, by Thorp, if there be a water which is a highway, which, either by an increase of the stream, or by its own force, changes its course to another bed, still the new channel remains a highway, as it

(b) Cre. El. 592.

(c) Inquisition being found thereupon.

(d) 4 B. & C. 603, by Holroyd, J.

(e) By Bayley, J., 4 B. & C. 603.

(f) F. N. B. 225.

(g) 2 Lord Keny. 499, Rex v. the Undertakers for making the River Douglass, alias Aston, in Lancashire, navigable.

was anciently, and the lord of the soil has no right to disturb the water in its fresh course.<sup>(h)</sup> And, on the other hand, when the sea or public rivers leave land derelict, the channel, before public, is vested in single hands, and so the right is extinguished.<sup>(i)</sup> This point underwent much consideration in a very recent case. The defendants were indicted for cutting a trench across the King's highway, and they pleaded not guilty to the charge. It appeared that the road thus broken up was an embankment across a creek. By an order of the Corporation of London, the defendants cut down this embankment, it being contended by the corporation, that the creek was a public navigable stream, which the road improperly obstructed. The road had been raised for twenty years past, from time to time, by the neighbouring inhabitants; and, indeed, for thirty or forty years there had been no navigation there, except that light boats, drawing little water, had occasionally passed over for half an hour before and after high water. Upon removing the embankment, an ancient bridge was discovered; but there was no evidence as to the time of its erection or decay, nor to shew for what purpose it had been built. The defendants contended, \*that no legal obstacle could be presented to the rights of navigation, unless it were by act of Parliament; and inasmuch as the arch [289] of the bridge was sufficient for navigation, and greater than the purposes of the road required, they said there should be a presumption that it had been so constructed so as not to obstruct an existing navigation. The learned Judge assumed, that a navigation had been carried on at some period, but stated the probability of its having been obstructed by a natural deposit of silt and mud; and added, that the defendants could not, at all events, justify cutting away the embankment further than might be necessary to open a very limited passage to the small boats, to the extent described by the witnesses. The defendants were found guilty. A rule nisi for a new trial having been discussed, the Court held the direction of the learned Judge right, and sustained the verdict. The grounds of their decision proceeded upon the principle of extinguishment. For, admitting that a right of navigation had existed, still, judging from the manner in which it had been neglected by the public, and from the length of time during which the obstruction had lasted, it could not be presumed otherwise than that the rights of the public had been lawfully determined. The original right most probably arose from the flux and reflux of the tide, by which the channel became navigable. But if the sea retreated, or the channel silted up, so as to preclude navigation, the public user would be destroyed by the operation of natural causes. Arising from natural causes, the right would thus determine in the same manner. And again, there would be an additional reason for this extinguishment, upon considering that another right, namely, the right of way, had been superinduced. The rule for a new trial was accordingly discharged.<sup>(k)</sup>

There may be an extinguishment both of public and private fisheries, although from different causes.

(h) 22 Ass. pl. 93. Said by Thorpe to have been so adjudged in the Eyre of Nottingham.

(i) Schultes, p. 121.

(k) 4 B. & C. 598, Rex v. Montague and others. As to the extinguishment of a towing path, see B. & A. 198.

Supposing that lands become derelict by the sea, in this case (if the sea have retreated from a place it had overflowed), they either belong to the Crown or to the original proprietor, if he be able to prove the identity of his property, by sea marks or otherwise. The right of public fishing, therefore, which existed on that spot previously to the recess of the water, must *ex jure naturæ*, be extinguished. If the ocean retire, and leave certain lands dry, which the Crown is entitled to claim, by virtue of general occupancy, and after some years the place in question be again overflowed, the public right might be said to have been suspended during [\*290] that period, and to have revived upon the \*return of the tide. So, again, if the Crown think fit to make a grant of lands to be reclaimed from the sea by artificial means, as by embankments, &c., the right of fishing becomes, *ipso facto*, extinguished, so soon as this grant is carried into execution. And if the sea break in again, or if the conditions of the grant be not complied with, the general public right will revive; although, possibly, in this latter case, the user of the *fishery* might be destroyed.

So in a creek of the sea, if the channel slit up, or the sea retreat, the same extinguishment will operate; for the public right having arisen from natural causes, would then be determined by natural causes also. (l) And an act of Parliament, or a writ of *ad quod damnum*, or, possibly, an order of commissioners of sewers, would extinguish a fishery of this public upon the same principle as a right nature, of navigation would be thereby taken away. (m)

A private right of fishing may also be destroyed in various ways. It is hardly necessary to observe, that an alteration in the channel of a river would extinguish the right upon that particular spot, although, in most instances, a party might follow the changed course of the river. For example, in a case of demise, the lessee might follow his fishing, under such circumstances, to the extent of his lessor's land.

So, again, if an island rise up in a river, the right of fishing is, of course, extinguished on that spot; for a fishing being a privilege inseparably connected with water, it must terminate when the subject to which it owes its origin is destroyed. (n) And so, again, it would be if a river should become dry; the right would be extinguished by a natural cause. (o)

A private fishing in a public water may be extinguished by abandonment; that is, by suffering the public at large to participate in the enjoyment of the stream. And a right of this kind is not so entire but that it may be lost as to part, and preserved as to part. Thus, in trespass for breaking and entering, an exclusive oyster fishery was claimed in Burnham River (which is navigable, and an arm of the sea), and the defendant shewed in evidence a custom for all the King's subjects to catch

(l) See 4 B. & C. 603, by Bayley, J.

(m) Ibid.

(n) Schultes, pp. 96, 97

(o) Id. p. 30.

*floating fish* there, without interruption. He contended upon this, that a fishery must be entire, and that the exclusive right \*was thus [\*291] disproved. By Heath, J. Part of a fishery may be abandoned, and another part, of more value, may be preserved. The public may be entitled to catch floating fish in the River Burnham, but it by no means follows that they are justified in dredging for oysters, which may still remain private property.(p)

Being a part of the profits of the land, a private fishery may also be extinguished by unity of possession. Thus it is said, in a case where watercourses were distinguished from ways and commons, in respect of their incompetency to be extinguished with the former, that the same law was of fishings also; that is, that they should be extinguished by such unity.(q)

We come now, in proceeding with the subject of extinguishment, to consider under what circumstances a mill may be altered, and in what cases it will lose its customary privileges by the change. And upon this point it is worthy of observation, that if the quality of a mill be altered, the act itself will work an extinguishment as far as its ancient privileges are concerned; but that the erection of a new mill of the same description will not have the same effect, especially if it be raised upon the site of the old one. To illustrate the first position needs very little research, because by varying the nature of the building, the tenants and inhabitants of a manor would lose the benefit which formed the consideration for the exclusive payment of toll. The following case is very apposite, although it related to a breach of covenant, and not to the cessation of customary rights. The mayor and citizens of London covenanted to find eight men to grind every day in Bridewell Mill, which they let to the defendant; and they agreed, that if they failed therein, the defendant should retain so much rent out of the sum which he had promised to pay them for rent. The defendant pulled down the corn mill, and made it a horse mill, but refused, nevertheless, to abate the covenant which had been made with him, insisting that he had a right to retain for rent the sum which the wages of the eight men would have realized. But the Court held, that the lessors were discharged by reason of this alteration of the mill, that the conversion was waste, although for the lessors' advantage, and that the same law would be, if a corn mill were converted into a fulling mill.(r)

So where the lord of a manor had two mills, where the tenants \*and resiants were bound to grind by custom, but they might [\*292] take their corn to either, at their own option; it was held, that the lord, by pulling down one of the mills, had suspended the custom.(s)

However, the building of a new mill occasions not any extinguish-

(p) 1 Campb. 309. 312, *Rogers v. Allen*.

(q) In the great case of *Sury v. Pigot*. Poph. 170.

(r) Cro. Jac. 182, *The City of London v. Greyme*. S. C. Mo. 877. 2 Ro. Ab. 814.

(s) 2 B. & C. 841, *Richardson and another v. Capes*.

ment, provided it be of the same kind. So that if the ancient mill be aliened, or if it fall, the lord may erect a new mill in another place within his manor, the tenure in such cases being to do suit to the lord and mill generally, and not to any particular mill.(t)

It seems that enfranchisement of the mill will not put an end to the privilege. Upon a bill filed in the Exchequer, a custom was shewn within a manor held of the King in fee-farm, that all the copyhold tenants should grind all their corn and grain baked and brewed within their ancient copyhold messuages, at a copyhold mill within the manor, and not elsewhere. The plaintiff Snoak was tenant for life of this mill in right of his wife, and the plaintiff White had purchased the freehold and inheritance. The defendant had erected another mill within the same manor, at which many of the copyhold tenants had ground their corn. Upon this the Court held, that the purchase of the freehold and inheritance of the copyhold mill, had not destroyed the copyhold for the life during which it was held; that the reversioner of the freehold of the copyhold was subject to the King's fee-farm rent, but not the copyhold during the life of the wife; and that the copyholder for life, therefore, should have no benefit as fee-farmer. The decree against the defendant was, that he should not withdraw or take any grist from the other mill.(u)

With respect to a mill in gross, if the suit be by custom, a severance from the manor will not affect its privileges; but if it be by tenure only, the severance works an extinguishment. A case occurred where a mill entitled to suit was severed from the manor, and it was held not to lose its ancient right. Thus, an abbot had a mill within the King's manor, and all the inhabitants were bound by custom to grind their corn there. The King granted the manor over, and by the dissolution of the abbey the mill came to the Crown, upon which the King granted it amongst other things in fee-farm. The residents and inhabitants were decreed to grind at this mill, notwithstanding the severance as though it had continued to be a prerogative mill, and appertaining to the King's manor, for there of common right \*all the tenants of the manor ought to [\*293] grind their corn, and by custom all the inhabitants.(v)

The contrary is the case when the suit exists by tenure. As where tenants held by fealty and suit to the lord's mill, and the lord aliened the mill, together with the suit of the tenants. The vendor then died, and his son considering that the tenants could not do suit to him who had not the manor, built another mill on another part of his demesnes, and thus regained the ancient suit. Because it was said that no man can have suit to his mill by reason of tenure, if it be not of corn growing in certain land within his seigniority.(w)

(t) 4 Rep. 88. (u) Hard. 176, *White v. Snoak and others, plaintiffs, v. Potter*.

(v) Hard. 21, *Currier v. Cryer*.

(w) 4 Rep. 88, referring to 17 E. 3. 67. 29 E. 3, 12.

Nor will unity of possession destroy these appurtenant rights. In a case where the usual custom was set up, the defendant did not attempt to deny the original liability; but he gave certain ancient deeds in evidence by which it appeared that King James I. became, and was at one and the same time, seised in his demesne as of fee, in right of his Crown, as well of the said mill as of the said messuage, which the defendant occupied during the time mentioned in the declaration. It was, consequently urged that the plaintiff's right to have suit under these circumstances was gone by reason of the unity. But the Court entertained a different opinion. Willes, C. J.: "We are not quite agreed whether the word seisin implies possession; but if it does, we think it does not destroy the custom; because we take it to be a custom not annexed to the estate, but personal to the inhabitancy. And therefore, taking it for granted that seisin implies possession, it does not imply inhabitancy: and if the King did not inhabit the house (which is not stated, and it cannot be presumed that it did), it is not such an unity as will affect the present case." The learned Chief Justice added, "it was plain that the custom could not have been annexed to the house, for the ancient houses only could have been affected by it, whereas a man living in a newly built house would be clearly liable; it might, therefore, be called *lex loci*." The plaintiff had judgment to recover.(x)

It will be found upon examination, that some principles of extinguishment which affect other rights, do not apply to watercourses. The latter are incorporeal hereditaments of a very perdurable nature; they survive notwithstanding alteration or nonuser equally with rights of common or rights of way; \*while on the other hand, unity of possession, which is fatal to the other privileges, leaves the watercourse subject, upon a division of property, to the same claims as before. There are modes, however, of defeating this right as well as others, as by suing out the writ of *ad quod damnum*, or by an act of Parliament. Such a neglect also, as we have seen, will extinguish a public right of this nature, will be subversive of the private right, after such a lapse of time as may bar an entry, and render the remedies by ejectment or assize unavailable. For although true it is, that being an incorporeal privilege, and collateral to the land, it cannot be divested by nonuser; yet that rule rather there refers to cases where has been no adverse possession of the place to which the right, whatever it may be, originally belonged. If it be appendant to land by a temporary neglect, the vested estate or interest therein does not cease its connection with the land of which it is an appurtenance; or if enjoyed in gross, the nonuser, provided there be no adverse possession, will not work an extinguishment.(y)

And so if the inhabitants have a customary right of watering their cattle at a certain pool, the custom is not destroyed, although they do

(x) Willes, 654, *Drake v. Wiglesworth*; and see further on the subject of mills, *Luttrell's case*, 4 Rep. 87. Poph. 172. 2 Show. 141, and post in this Chapter.

(y) See 5 Rep. 124 (a). 3 Cro. Dig. 92.

not use it for ten years. Nevertheless, it becomes of course more difficult of proof. But if the right be discontinued, although for a single day, the custom is gone.(z)

Passing by the method of extinguishing a watercourse by act of Parliament,(a) (a course too clear to need further observation), we proceed to mention the *ad quod damnum* writ. And in this case it is equally certain, that if upon the return of such a writ, the stoppage of a watercourse should not appear to be to the injury or prejudice of any one, the King may license an extinguishment by those means, as he may destroy an ancient highway by virtue of the same writ.(b)

It has been said, that accidents which would destroy a way, or a common, will not affect a watercourse. Unity of possession is one of these. Thus in the case of the gutter. Two persons had tenements adjoining to each other, the one had a gutter in the land of the other, and both tenements subsequently fell into the same hands. They were then again divided, and the defendant having stopped the gutter, the plaintiff counted on the custom of London, averring that no man could meddle [295] with a watercourse where there were adjoining houses, although the stream might be upon his own land. And it was considered, that the gutter had revived after the severance, because of the necessity of the thing.(c) So in another case of a gutter, where a party was seised in fee of the place where the eaves were, and was possessed of a term of 500 years in another place where the easement was enjoyed, it was held, that this unity of possession did not destroy the privilege, but it was merely suspended, ready to revive upon the severance. And although the plaintiff in this case had raised a wall from whence the water fell upon the defendant's land, it was held to make no difference.(d) "Since the alteration the drops have to fall from a greater height."(e) Besides the ground above mentioned for holding that the easement revived, there seems to be another, and, indeed, the true one, which was not adverted to at the Bar, nor by the Bench. A gutter like this is of necessity. Its existence is several, and, like a watercourse, is independant of the soil, and is thus unlike a common, way, or rent, which latter perish by the unity of the easement. The sheriff cannot give possession of the gutter, nor can ejectment be brought for it, and although it does not begin like a stream *ex jure naturæ*, it yet partakes of the necessity above mentioned. It can only be extinguished by a manifestation on the part of the owner of the united property, that he will no longer enjoy both together, as if he should cut the pipe, and so scatter the stream, thereby at once dissolving the alliance. The same

(z) Tomlins, tit. Custom.

(a) "By a law a watercourse may be diverted." Vaugh. 339.

(b) Vaugh. 341.

(c) 11 H. 7, 25. Bro. Extng. citing S. C. pl. 68. S. P. Hob. 131, by Hobert, C. J.

(d) 2 Cr., M. & R. 34, Thomas v. Thomas and another.

(e) S. C. by Alderson B. S. P. as to suspension. 9 C. & P. 47, Clay v. Thackerah. S. C. 2 Moo. & Rob. 244.



doctrine has been subsequently affirmed.(f) For things which have an existence during the unity, are not extinguished by the unity. And thus a common or a way, or a rent, become thereby extinct, since their existence ceases upon the union of estates. But this is not so with a watercourse. For it was laid down in an old case, that a *precipe quod reddat* would lie for an acre of ground covered with water, or a *præcipe quod reddat* generally for one acre of land.(g) And so again, it has been determined, that ejectment cannot be brought for a watercourse, for that livery of seisin cannot be made of it; it delays not, but is for ever flowing, and the writ of *habere facias possessionem* cannot be issued respecting it.(h) These cases prove its separate existence, notwithstanding an unity of possession; but a decision took place, a few years afterwards, by which the doctrine as \*above stated was fully confirmed. [\*296] The plaintiff declared in case for stopping his watercourse, and the defendant shewed an unity of possession in his plea, justifying the destruction of the water course upon that ground. The plaintiff demurred, and the Court after a long argument, and much consideration, gave their judgment in his favour.(i) A distinction was taken between a way, or common and a watercourse, because the former begin by private right, as by prescription, or assent; they are particular benefits to take part of the profits of the land; and so upon unity, the greater profit drowns the less; but it was said, that a watercourse has its origin in neither of the above ways, for it begins *ex jure natura*, and cannot be averted.(k) And by Doderidge, J.; if one have a mill, and a watercourse unto it, and sell the land, the water may not be stopped, being there of necessity, and the same hath a continual running.(l) The authorities in the Year Books, which are cited above, were also mentioned on the plaintiff's behalf. Nevertheless, it seems, that if the owner of the property declare his intention that he will not enjoy the land and watercourse together during the unity, it may be thus extinguished. As where one had a stream of water running through a leaden pipe, and then sold the land, on which the purchaser cut and destroyed the pipe; by this act the watercourse became extinct, because the proprietor had declared an intention that it should no longer be enjoyed within the land.(m)

The same rule might apply to the pulling down of mills, houses, &c., to which an easement of this kind might form an appurtenance: but the mere alteration of the premises entitled to the right will not work such an extinguishment. Thus, by Mr. Justice Periam, if a man hath a mill and a watercourse time out of mind, which he hath used to cleanse, if the mill fall down, and he set up a new mill, he shall have the liberty to

(f) 16 Mees. & W. 484, *Pheysey v. Vicary*. (g) 12 H. 7, 4, by *Varisor*.

(h) *Yelv.* 143, *Challenor v. Thomas*.

(i) *Poph.* 166 *Sury v. Pigot*. *Latch.* 153, S. C. *Palm.* 444, S. C. *Noy. Rep.* 84, S. C. 3 *Bulst.* 339, S. C. *nom. Shury v. Piggot*. *Sir Wm. Jones.* 145, S. C.

(k) By *Whitlock, J.*, 3 *Bulst.* 340. (l) 3 *Bulst.* 340. *Poph.* 168, 172.

(m) *Palm.* 446, *Lady Browne's case*, cited by *Doderidge, J.*, *Noy. Rep.* 84, S. C. cited.

cleanse the watercourse as he had before.<sup>(n)</sup> Again, an action, was brought for injuring a watercourse, and the declaration stated, that the plaintiff was seised in fee of two old and ruinous fulling mills, that he had enjoyed a stream of water from time immemorial, and that during all that time there had been a bank to keep the water within the current, that he subsequently pulled down the fulling mills, and erected two corn [\*297] \*mills in their room, and that the defendant broke down his bank, and so diverted his water. A verdict having been found against the defendant upon not guilty, errors were assigned: 1. That a watercourse which had been possessed in respect to fulling mills could not be prescribed for in respect of grist mills, and that the plaintiff had consequently destroyed his prescription. But the Court affirmed the judgment, thereby holding, that the plaintiff might alter his mill in any respect according to his pleasure, provided he did no injury to another person. It was said, that the mill was the substance, and that the addition only demonstrated the quality; and that the alteration regarded the quality, and not the substance.<sup>(o)</sup>

The same law applied, as holden by the Judges, to conduits, water-pipes, and the like.<sup>(p)</sup> There was another error assigned against the prescription upon a point of pleading, which will be mentioned in another page.<sup>(q)</sup> Neither an alteration of the place, therefore, to which the watercourse is an appendancy, nor an unity of possession, will operate to defeat a claim of an easement so necessary as an accustomed flow of water. However, a mere easement may be extinguished, as the right to repair banks.<sup>(r)</sup>

[\*298]

## \*CHAPTER XI.

## OF INCIDENTS TO RIGHTS CONNECTED WITH WATER.

THIS Chapter will be set apart to the consideration of several incidents which accompany the possession or exercise of rights connected with water. One of the chief of these is toll; and it will be found desirable to enter fully upon this topic, as many questions of importance have arisen. It is only necessary to mention the disputes concerning canal tolls as a proof of this assertion.

Very nearly allied to this point, is the liability to pay dockage duties, which will follow immediately after tolls.

(n) Godb. 97.

(o) 4 Rep. 86, Luttrell's case. See Hutt. 58.

(p) Id. 87. (q) Post, Chap. XII.

(r) 9 C. & P. 47, Clay v. Thackrah. S. C. 2 Moo. & Rob. 244.

We shall next propose to collect the cases which have been determined, on the rateability of certain rights of the nature above alluded to, as fish-eries, canal tolls, dock duties, water-works, &c.

Some of these properties are liable also to the burden of rent-charges in lieu of tithes. It will be our duty to point out the distinctions which exist between such rights or profits as have been deemed open to this charge, and those which are exempted.

Other matters, such as considerations respecting settlement in certain cases, dower, distress, and devise, will then be touched upon. And although all these incidents do not, of course, belong to every individual right above noticed, some are, nevertheless, attached to one species of privilege, some to another; and the course pursued is to represent each of these under its proper head to the reader.

Rights of water are not in general liable to tolls. Indeed, it may be laid down as a principle, subject to certain qualifications, which will be stated by and by, that public waters are exempt from any claim of this kind. They are the birthright of every man, and a duty cannot, therefore, be imposed in respect of such \*privileges.(a) If indeed, a [\*299] subject receive some particular benefit, as going over a bridge, coming into a quay, wharf, or port, a toll may be demandable;(b) but, to use the words of Lord Chief Justice Hale, if any man will prescribe for a toll upon the sea, he must allege a good consideration, because by Magna Charta and other statutes, every one has a right to go and come upon the sea without impediment.(c) And an act of Parliament will of course be effectual to enforce a toll any where within its operation.

Evil, or outrageous tolls, as they were called, were forbidden expressly by very early enactments. Thus it was ordained by the great charter, that all merchants, unless otherwise prohibited, should "buy and sell without any manner of evil tolls, by the old and rightful customs, except in time of war."(d) The position above stated as to toll, is not confined to public waters, (although we have only to do here with the cases which concern that particular subject,) it is an universal rule, that toll-thorough is against common law and right, and that it cannot be supported by usage.(e) It can exist only by prescription or grant, and a particular consideration for exacting it must be shewn.

Hence it follows, that no toll is demandable for vessels navigating the high seas. The sea has been called "the great highway of the world," and it is common to all. This freedom is, however, subject to two exceptions: the first arising from benefits done to the community at large,

(a) And although a man may have amends for a trespass in unloading upon his grounds, he may not take any thing as a certain common toll. One M. was fined one hundred marks for so doing. Hale de Port, p. 51, recognised, 5 B. & A. 295.

(b) Willes, 115.

(c) 1 Mod. 105.

(d) 9 H. 3, 30. See also 3 Ed. 1, c. 31.

(e) Willis, 115.

which form a just consideration for a toll; and the second, proceeding from legislative provisions.

Thus, where private exertions have succeeded in forming a harbour, or port.(f) or quay, so as to be beneficial to the community at large, the case is different; and upon many occasions where the accommodations are made upon the land of the party demanding toll, it is a toll-traverse, which implies a consideration.

[\*300] \*There was prescription for toll in consideration of maintaining a certain quay, and a bushel of salt had been immemorially taken from every ship which came laden with salt into Slipper Point. The ship in question came within Slipper Point, and was detained for the toll. It was contended, that the avowry could not be supported for want of a meritorious consideration; and although the Court were of that opinion, and so against the prescription, yet they distinctly held, that had the prescription been for a port, it would have been good.

Here the prescription was for a wharf, not for a port; and it was thus clearly recognised, that a toll upon the sea could not be required.(g) And by Wylde, J., if a ship be driven in by stress of weather, and goes out again the first opportunity that presents, shall that ship pay?(h) "The avowant," said Hale, C. J., "may as well prescribe to the confines of France."(i)

Again, a custom was alleged, that the mayor and burgesses of Newcastle had been accustomed from time immemorial to repair the port of their town, and that they had been used to have a toll of fivepence per chaldron for all coals exported. The Court considered this a very reasonable custom; for without ports there would be no navigation, and without a duty the port would not be repaired. It is worthy of observation, that the making of a port is a consideration for toll.(k)

Thus in assumpsit for the weighage of goods brought into the Port of London, it was objected, that there was no consideration for the duty. But as the defendant had the liberty of bringing his goods into port, which is a place of safety, it was resolved, that the consideration was implied.(l)

And the same law was understood in a case reported by Lutwyche, though not that expressly decided, namely, that the owner of a port might have a toll by prescription, without alleging any consideration.(m)

(f) It is not the design of this work to treat of ports, havens, or of roads, further than as the mention of these subjects incidentally occurs. It has been the Author's object to separate the laws relating to navigation as much as possible from this work.

(g) 1 Mod. 104, *Warren v. Prideaux*. S. C. 3 Keb. 249. 275. S. C. Sir Thos. Raym. 232. S. C. 2 Lev. 96, nom. *Prideaux v. Warne*. S. C. 1 Freem. 355, nom. *Prideaux v. Warne*. (h) 1 Mod. 105. (i) Thos. Raym. 233.

(k) 1 Lord Raym. 384, *Vinkensterne v. Ebdon*. S. C. 1 Salk. 248.

(l) 3 Lev. 37, *Mayor, &c. of London v. Hunt*. S. P. 2 Wils. 95, *The Mayor of Exeter v. Trimlet*. (m) 2 Lutw. 1519, *Wilkes v. Kirby*.

\*But the doctrine was fully established in a subsequent case. The Mayor and Corporation of Yarmouth prescribed to have a [\*301] toll, called measurage, from every merchant exporting corn or grain from the Port of Great Yarmouth to ports beyond the seas; but the consideration was not set forth. There was a demurrer, and it was said, that there could not be any thorough-toll without a special consideration; but the Court were of a different opinion. They said, that the port was a self-evident convenience to the merchant, and that the making it was of itself a consideration.(n)

There may also be a prescription to take toll for keyage, or bushelage,(o) and wharfage;(p) but as those franchises evidently concern a right enjoyed upon the land, they are merely alluded to here by way of illustration.

A toll-through may consequently be exacted from ships in respect of a port or harbour, because there is a consideration, which is so obviously for the public good, that the merchants are bound to compensate the owner of the port for the shelter which it has afforded to their vessels.

For the same reason as that which we have given respecting the sea, namely, that the navigation of it is common to all the King's subjects, there cannot be any toll upon a public navigable river. This rule, however, may be qualified in like manner with the other, as we shall presently observe.

The first case we shall mention was a special action upon the custom of wharfage and cranage in the City of Norwich. The declaration stated that there was a common wharf with a crane to it, and that there was a custom for all goods brought down the river, and passing by, to pay a duty. It was objected, that this claim of toll was bad, being for toll-thorough. If, said Mr. Justice Twisden, they (the citizens) had unladed at the quay, they should have paid the whole duty, or even had they done so at some other place within the city, there might have been some reason for the charge, or had they cleansed the river. The learned Judge added,(q) that there had been a toll claimed at Gravesend for boats lying in the River Thames, which had been adjudged ill by Parliament.

\*The judgment of the Common Pleas in favour of the toll was reversed.(r) [\*302]

This freedom from toll was again solemnly established in a great case

(n) 3 Burr. 1402, Mayor of Yarmouth v. Eaton.

(o) 2 Str. 1228, Sargent v. Reed. S. C. 1 Wils. 91.

(p) 1 Cowp. 47, Colton v. Smith.

(q) This was said by Coleman, counsel for the defendant, according to the report in Ventris.

(r) 1 Mod. 47, Haspurt v. Wills. S. C. 1 Ventr. 71. S. C. 1 Sid. 454, nom. Heshord v. Wills. S. C. 2 Keb. 624. 665.

where the plaintiffs, the Lords of the Manor, sought to exact a toll for the passage over a public river which flowed through their manor. They declared, that the town of Nottingham was an ancient town, and the Manor of Nottingham an ancient manor, being immemorially parcel of the County of Nottingham. That the River Trent was an ancient navigable river, and that the Mayor and Burgesses of Nottingham had always taken a toll from every boat laden with goods navigated on that river through the manor. They also declared for a toll for passing through a bridge. The jury found a special verdict, affirming for the most part the matters in the declaration. There were three objections to the plaintiffs' claim; but as the second was the principal, and that on which the defendant prevailed, namely, because the prescription was a void prescription, we will confine ourselves to that only. The Court considered the river in the light of a public highway, and said, that as both reason and authority militated against any claim of toll for passing along a public road, the same rule must apply to an ancient navigable river. The Court observed upon the distinction between a public and a private right, the latter might be presumed to have a reasonable commencement; but let that test be applied to the general privilege, and it will be found that it must begin by agreement. Then who could agree for the subjects of England? They could not consent to part with their rights, nor could they be deprived of their rights, any otherwise than by act of Parliament, in which the consent of every one is implied. This was not a toll traverse, for toll was demanded for nothing else but navigating on the River Trent, and it therefore became necessary to shew a particular consideration. The Judges were very clearly of opinion that the prescription could not be supported.<sup>(s)</sup> Nevertheless, the Court in this last case made use of some expressions recognising the qualification of the rule above-mentioned. For they said, that coming into a port, or landing on the plaintiff's manor or quay, or coming to a wharf, would be particular benefits, and thus would distinguish the case from toll-thorough.<sup>(t)</sup> And thus it follows, that there are two cases in which a toll may be had upon a public river; first, where a sufficient consideration appears, and, secondly, where the \*nature of the benefit

[\*303] is such, as to imply a consideration. As to the first, an action was brought by the Mayor and Burgesses of Gloucester, for toll in respect of every boat passing by the river, and the claim was allowed.<sup>(u)</sup> It must be presumed, that some sufficient consideration appeared.

*Quo warranto* was brought against the Corporation of Boston for demanding toll-thorough. They justified the demand by reason of a consideration for repairing a bridge and pavement, and also a sea-bank; and the Court held upon this, that although toll-thorough could not be claimed as such, without more, yet as here it was founded upon a consideration, it should be deemed good.<sup>(v)</sup> On the other hand, case was brought

(s) Willes, 111, *The Mayor, &c. of the Town of Nottingham v. Lambert*.

(t) *Id.* 116.

(u) 21 H. 7, 16.

(v) Sir William Jones, 162, *Roy v. The Corporation of Boston*. See Cro. El. 711, by Popham, C. J.

against a defendant for carrying his barley over a certain bridge without paying toll. The claim was for toll-traverse, and no consideration was shewn. It was urged for the defendant, that no action lay in this case without shewing title and consideration; but the Court observed, that the consideration would appear upon the evidence, and that the declaration need not contain such title, &c.(w) This last case, indeed, was said to be founded upon a private right of *toll-traverse*, and it is desirable to attend to the distinction, that strictly speaking, toll-thorough is for passing highways, bridges, ferries, &c., which are *public*; but toll-traverse for such a passage over private ways.(x) And yet, although a port may be created by the exertions of individuals, *toll-thorough* may be demanded in respect of it, as we have seen. Toll-thorough, and toll-traverse, are said to have been used promiscuously in our books;(y) and, if so, any difficulty which may arise, in consequence of an apparent confusion of the public and private right, will be obviated. For example, in the case just now quoted from Levinz, where the claim was of toll for passing over the Bridge of Ware, if it were a public bridge, (as it was most probable), toll-thorough in strict language, and not toll-traverse, was the right toll demanded, because of the public place. And although a consideration would be implied from evidence of the repair of such bridge, yet the liability, by implication, applies equally to the one and the other toll, as we have proved in the case of the port.

Secondly, a toll may be exacted both upon the sea, and also upon rivers, under the sanction of acts of the Legislature.

\*It will not be attempted here to set out the different statutes which impose tolls or dues of various kinds. The principle on [\*304] which, however, they seem to be founded, is, that ships shall have an equivalent, or advantage, before they can be legally subjected to duties. And so, in the case of Ramsgate Harbour, where a vessel passing on the north-east side of Godwin Sands, and not through the Downs, had the duty imposed upon her; it was held, on action brought, that there was no pretence for the charges, because the ship had received no benefit from the harbour.(z) This last case was cited with success upon a subsequent occasion, where the same point was discussed; and De Grey, C. J., said, that the question was, whether the ship had come into such a situation as for it to be in a probable capacity of receiving aid from the harbour of Ramsgate; but the other Judges, although they agreed as to the points in the case, thought that the rule laid down by the Chief Justice was too general.(a) So again, it is well known, that the beaconage and lighthouse duties demanded by the Corporation of the Trinity House are authorized by Parliament, by reason of their evident utility. But there

(w) 3 Lev. 400, *Steinson v. Heath*.

(z) 1 Sid. 454.

(y) 1 Mod. 232, by Maynard, Serjeant, arg., to which the Court acceded.

(z) 4 Burr. 2258, *Matson v. Scobell*.

(a) 2 Sir Wm. Bl. 764, *Poole v. Jonson*.

must be some benefit accruing to the vessel chargeable for the dues demanded by the corporation. A question was made whether British built ships, the property of British subjects, were liable to pay for passing by the Eddystone, and other lighthouses in the Channel, when sailing from one foreign port to another, and not having touched at any port in Great Britain or Ireland. The act relied upon in favour of the imposition, laid the duty on ships inward or outward bound; and the Court said it was most evident, that the claim must be confined to vessels either departing from, or touching at British ports. Foreign ships could not be called on for the duty under such circumstances; and it would be a breach of public policy to inflict a burthen upon our own vessels, to which foreigners are not subject. Judgment was given against the Trinity House.(b)

So where a ship was chartered for the transport service, a temporary ownership was held to pass to the Crown, and, therefore, a nonsuit was entered in an action of assumpsit for tolls.(c) And where the proprietors of a lighthouse were empowered to take tolls, the exception of his Majesty's ships of war was held not to warrant the inference that other ships belonging to the Crown were chargeable with toll. The exception might have been *ex majori cautela*.(d)

[\*305] \*The long enjoyment of tolls lays a foundation for a good consideration in respect of them.(e)

The exceptions from these tolls are pointed out by particular statutes, and vessels employed in his Majesty's service are usually exempted from the duty. It was once made a question whether vessels hired by the Postmaster General to carry the mails and dispatches from Dover to Calais and Ostend, could be said to be vessels within the exception of an act which imposed a tonnage on all ships coming into an harbour of Dover unless employed in his Majesty's service. The collector of the rates for the port having seised the plaintiff's telescopes, trespass was brought in order to try the right. It was urged for the defendant, that the vessel in question was the private property of the master, that the employment of the Crown was partial, for that with the exception of carrying the letters and public despatches, the vessel was not in the employ of government. But the Court observed, that there were two exemptions, 1st, of all vessels belonging to his Majesty, and, 2ndly, of all such as should be employed in his service. Now here the captain was appointed by the Postmaster General. The appointment stated the vessel to be employed in his Majesty's service, and the captain was directed to obey such orders as he should from time to time receive from the agents of government. The latter stipulation was quite inconsistent with the right

(b) 3 T. R. 768, *The Trinity House v. Sorsbie*.

(c) 4 M. & S. 288, *Master of the Trinity House v. Clark*; and see 2 Ch. Rep. 689, *Trinity Corporation v. Staples*.

(d) 1 B. & Adol. 509, *Smithett v. Blythe*.

(e) 5 Q. B. 773, *Mayor, &c. of Exeter v. Warren*. S. C. Dav. & M. 524.



of employment being in the captain. Judgment was therefore, given for the plaintiff.(f)

But it is fitting that we should notice an enactment here, which forbids the taking of exorbitant toll upon the Thames. According to the preamble, a moderate and reasonable price might be taken from the owners of barges, boats, &c., at locks, wears, &c., for assistance in the passage. But the price of water carriage having been raised, and divers abuses having been committed by the bargemen,(g) it was declared, that the justices for Wilts, Gloucestershire, Oxfordshire, Berkshire, and Bucks, should be commissioners for executing the act, five to be a quorum. They are to make orders at the quarter sessions, upon due examination upon oath, for settling reasonable rates and prices in this matter within their respective counties, having regard to the ancient rates, as well as the necessary charges, of repairing such locks, &c. They are further empowered to make other orders concerning the navigation, and the locks, &c., together with the shutting them, &c., and also [\*306] \*respecting bargemen so as to prevent the abuses which happened before the act.(h) Then, they have authority at their Easter sessions, to assess the rates in question, public notice being subsequently given in writing to the mayor, or other head officer, in every market town within the counties, of such rates and prices, and all other rates, &c. Should any owner of barges, &c., after such notice, take a higher rate than has been ordained, or should any person offend any regulation made in pursuance of the act, he shall forfeit 5*l.* for each offence; to be recovered by the party grieved, with double costs, in any action of debt, &c., wherein no essoin, &c.(i)

Any one considering himself aggrieved by the rates of the justices, may appeal to the Judges of assize at Oxford, within one year afterwards; and the rule complained of may be confirmed, vacated or altered, as may be deemed convenient.(k) The next section prescribes, that these orders shall be duly registered at the sessions, and shall continue in force for seven years, when made, or confirmed by the Judges.(l) Locks, &c., are to be considered to be situate in the county where they are rated to the church or poor.(m) The act, however, shall not lessen the authority of the mayor, commonalty, and citizen's of London, or of any other corporation, or of any other person.(n)

Lastly, every bargemaster, and owner of barges, &c., shall be answerable for damages done by his crew to any wear, lock &c., and may be prosecuted, and, if found, guilty, the plaintiff shall recover his damages, together with full costs of suit.(o)

In speaking of canal tolls, it cannot but be evident, that they are

(f) 5 B. & A. 649, *Hamilton v. Stow*.

(g) 6 & 7 W. 3. c. 16, s. 1.

(h) Sect. 2.

(i) Sect. 3.

(k) Sect. 4.

(l) Sect. 5.

(m) Sect. 6, sect. 7, is repealed.

(n) Sect. 8.

(o) Sect. 9. This act is continued by 22 G. 2, c. 46.

chiefly regulated by the various acts of Parliament applicable to each canal.<sup>(p)</sup> And as the cases which have arisen were decided upon the construction of the several statutes relating to each particular subject, the general principle is rather to be gathered from the effect which the Courts have given to the enactments themselves, than from the decisions upon them. The principle seems to be, that the acts which imposes a toll shall be construed as strictly as may be proper; for to use the words of a learned Judge, "our construction may, perhaps, be inconvenient, but we cannot make a new toll."<sup>(q)</sup> Therefore, the limits of places from whence the persons who undertake a voyage are to pay toll, are preserved inviolate. Trespass was brought <sup>for seizing the plaintiff's</sup> [<sup>307</sup>] barge. The defendants pleaded the general issue, and they claimed an additional toll of one shilling per ton gross tonnage on coal and coke navigated upon a certain part of the Cromford Canal. The words of the clause imposing the toll were these: "For all coal and coke which shall be navigated, carried, and conveyed upon any part of the said intended canal, from the place where the said canal, shall cross the River Amber, or from any place within two miles thereof, and passing in the direction towards Cromford, the further sum of one shilling per ton." The plaintiff's barge had commenced her voyage at a place *more than two miles from the point* mentioned as above, she had been navigated on a part of the Cromford Canal, with coal and coke on board, within the specified distance, and she was passing in the direction towards Cromford. It was the opinion of the learned Chief Justice,<sup>(r)</sup> that the words "navigated from," meant a voyage from the place where the goods were loaded on board the barge. Now the place in question was not within two miles of the point specified in the clause, and therefore the ship was not liable to the additional toll. The court were of the same opinion;<sup>(s)</sup> and it was said by Holroyd, J., that the words of such a clause must be perfectly clear, before a fresh tax should be imposed by their decision.<sup>(t)</sup> So, again, it was enacted, that the Monmouth Canal Navigation proprietors should not take a greater rate of tonnage than those of the Brecknock Canal. The latter, by a resolution entered into at an assembly, ordered a reduction of their tolls. The Monmouth Canal Company, conceiving this not to have been a regular proceeding, did not reduce theirs; and it was contended on their behalf, that the advantage or disadvantage must be reciprocal, and that this moreover, was not a legal reduction. But the Court held, that the plaintiffs could not question the validity of the resolution passed by the Brecknock Canal proprietors under their common seal, at least so long as the proprietors of the canal thought fit to submit to its validity. It would have been otherwise if the reduced toll had been taken fraudulently, and without any colour of authority. Judgment was given for the defendants.<sup>(u)</sup>

(p) A canal act is not necessarily a public act. 1 Moo. & Malk. 421, Brett v. Beales.

(q) 3 B. & A. 140, Bayley, J.

(r) Abbott. (s) 3 B. & A. 139, Brittain v. The Cromford Canal Company.

(t) Id. 141.

(u) 4 B. & A. 453, The Company of Proprietors of the Monmouthshire Canal Navigation v. Kendall and others.

Here, again, the principle of a strict adherence to the act of Parliament was followed.

A canal act ordained, that no boat navigating thereon of a less burthen than twenty tons, or which should not have a loading of twenty tons on board, should be allowed to pass through any of <sup>the</sup> locks without paying tonnage equal to a boat of twenty tons. No toll [\*808] was specifically imposed upon empty boats. Tonnage was demanded, however, in respect of empty boats, and assumpsit was brought to recover back money so paid. There were two decisions upon this question: upon the first occasion, the Court gave judgment in favour of the toll; but they subsequently came to a different conclusion. The principle adopted in the last case, was conformable to that stated above, namely, that those who seek to impose a burthen upon the public, should take care that their claim rests upon plain and unambiguous language. The fact was, that boats of a greater burthen than twenty tons sometimes navigated with less than that quantity of cargo, so that the company were deprived of part of the benefit which the Legislature intended them; so that a subsequent act (the act in question) put boats of greater burthen than twenty tons, but carrying less than that quantity of cargo, upon the same footing as boats of twenty tons. As no toll, therefore, was imposed upon empty boats, the Court gave judgment for the defendant, who upon the last occasion, was sued in assumpsit for tolls.(*uu*)

Certain tonnage was permitted by an act to be taken for all coals, &c., conveyed upon a canal. *Manure*, however, was exempted. By another section, no boat was to pass though any lock unless it should pay a duty equal to what would be paid by a vessel, loaded with a burthen of thirty tons, or unless it should be returning, after having passed the canal, with a greater burthen than thirty tons. It was held, that a vessel laden with thirty-eight tons of manure, which had entered the canal and passed some miles along it, was not liable to any toll on returning through the lock empty, after discharging her cargo.(*v*)

Gravel and materials for the repair of turnpike roads, are liable to toll under a canal act imposing a toll on coals, lime, timber, bricks, stone, and all other goods, wares, or merchandize whatsoever.(*w*)

An alteration in terms, by calling goods light which were before considered heavy will not vary the construction of an act of Parliament.

(*uu*) 1 B. & C. 424, *The Company of Proprietors of the Leeds and Liverpool Canal v. Husler*, S. C. 2 D. & R. 556, overruling 2 B. & A. 66, *Hollinshead v. the same*.

A simple lockage duty of 5s. upon empty boats, was subsequently imposed. 1 B. & C. 425, n.

(*v*) 13 Mees. & W. 114, *Hall v. Grantham Canal Company*, 13 L. J., Exch. 283. Judgment affirmed. 14 Mees. & W. 880. 3 Railw. Cas. 710. 15 L. J. Exch. 63.

(*w*) 3 Railw. Cas. 724, n., *Coulton v. Ambler*.

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[\*309] The jury found in an action of debt, brought for \*certain rates and tonnage, that hops, wool, and teasles, had been considered heavy goods: but that within the last ten years, such things were according to the custom of the country, deemed light goods. The canal act in question gave a higher rate of tonnage for light than for heavy goods. The Court observed, that the words "light goods" was a loose expression; but it was clear, that if the action had been brought a year after the passing of the act, a verdict must have been against the claim; and, because the county had since chosen to consider those light, which were before heavy goods, the defendants could not be affected, inasmuch as they were not bound by any such change. Judgment was accordingly pronounced against the toll.(x)

If a mileage duty be allowed by an act, and the company are prohibited in certain cases from taking more than a certain amount of gross toll, they are expressly deprived of the power of taking an uniform rate of tolls along their line. Judgment was, therefore, given in their favour upon a writ of mandamus, and demurrer to a traverse of the return.(y)

Upon auxiliary railroads made by individuals under the authority of a canal act, the tolls were not to exceed those of the canal company, which on limestone were 2½d. per ton. The company were empowered by agreement with the landowners to construct auxiliary roads, and to charge 5d. a ton. The lessees of several iron works, and, amongst others, of B. works, having formed a joint stock company with other persons, constructed a railroad connecting a lime quarry with the iron works and the company's roads. In the partnership deed of this railroad company there was a covenant by the lessees of the B. works with the other shareholders, so long as the covenantors should occupy the works of B., to procure all the limestone used in these works from the quarry, and to carry it by the said road, and to pay a toll of 5d. per ton. A bill was filed by the shareholders of the railroad to enforce this covenant against the purchaser of the B. works, with notice of the partnership deed. The Court held, that the covenant did not run with the land, and that the Court would not, by reason of the notice, give the covenant a more extensive operation than the law allowed, and that the covenant for securing 5d. a ton to the railroad was a fraud on the canal company.(z)

[\*310] \*The Court of quarter sessions is sometimes invested with authority to control the disbursements of canal companies. Their power, in this case again, must be exercised in conformity with

(z) 6 Taunt. 151, *The Company of Proprietors of the Staffordshire and Worcestershire Canal Navigation v. The Company of Proprietors of the Navigation from the Trent to the Mersey*. See 12 Ad. & El. 622, *Fisher v. Lee*, S. C. 4 Per. & D. 447.

(y) 3 Railw. Ca. 1, *R. v. Leicestershire and Northamptonshire Union Canal Company*. There were cited in the argument, *R. v. Grand Junction Canal Company*. Id. 14; and *R. v. Glamorganshire Canal Company*. Id. 16. This case was affirmed in error. 3 Railw. Cas. 730.

(z) 2 Myl. & K. 517, *Keppell v. Bailey*.

the act of Parliament which gives them authority. A company were, amongst other things, empowered to make "all such other works as they shall think necessary and proper for effecting, completing, maintaining, improving, and using the said canal, and other works." The company were required to lay before the sessions an account of the sums expended, and afterwards, an annual account of the tolls collected, and of the charges of supporting the navigation. The sessions were authorized, under certain circumstances, to reduce the canal rates. After the completion of the canal, and after the first account of the capital expended in the undertaking had been delivered, upon which the dividends were to be calculated, the company deemed it necessary to erect a reservoir and steam engine. The canal company, in applying to have an annual account allowed, included the expenses of these new works; but certain freighters on the canal having objected to the items, the justices disallowed the sums in question, although it appeared in evidence before them, that the works had been erected for the support and improvement of the original line of road, and for the better supplying it with water in dry seasons. This order being ordered into the Court of King's Bench by certiorari, it was quashed by the judgment of the Court. Though the works might be new in specie, yet, being for the maintenance of the old canal and works, they were justifiably made. Had they been colourably executed for the benefit of individuals, the charges might and would have been repudiated; but this was not so, and the sessions having proceeded upon a wrong principle, their order could not stand.(a)

Another case has occurred upon the acts relating to the same company, and in some measure touching the same point. It appeared, that in pursuance of the directions contained in the 30 Geo. 3, (the first act which was passed to regulate the affairs of the company,) the annual account of the rates, and of the charges of maintaining the navigation, together with the several works belonging to it, from Michaelmas 1823 to Michaelmas 1824, was presented to the justices at the Michaelmas Sessions in 1824, and filed amongst the records of the Court. In that account there was a certain charge for labourers, repairs, &c. At the Midsummer Sessions in 1827, one B., a freighter upon the canal, objected to some of those charges, and particularly to a sum of 400*l.*, stated to be laid out by the company, in widening and deepening the canal, at a wharf of Messrs. Crawshay and Co., and he applied to the justices to examine the account. It appeared also, that the pressure [\*311] of the trade, and the crowded state of the vessels, occasioned a necessity for more room at that particular place. The freighters and owners of boats navigating the canal, having made frequent complaints upon the subject, requesting that the canal might be widened and deepened, the company accordingly made the improvement, the charges for which were now complained of. But the justices, on examination of the account, disallowed the sum of 400*l.* in question, and made an order that it should

(a) 12 East, 156, The King against The Glamorganshire Canal Company.

be expunged. Upon this, a rule nisi was obtained, calling upon them to shew cause why a writ of certiorari should not issue for the purpose of removing their order into the Court of King's Bench.

It was contended by the counsel against the rule, that this was not a charge for maintaining the navigation within the act of Parliament, for the deepening and widening was, pro tanto, the making of a new canal; and adapting it to the new purpose of allowing vessels of a larger size to navigate it. It was urged on the other side, that this act was an improvement of the canal, and that the company were authorized to improve. The Court were of opinion, that the statute in question ought to receive a liberal construction, and that, whatever expense had been incurred in doing works deemed necessary for the convenient use of the canal, might be considered to be an expense attending the using of the canal, within the meaning of the clause. The widening and deepening was done at the request of persons who navigated it. This deepening was convenient for the using of the canal, by admitting into that part of it vessels of larger burden than could otherwise have been admitted; and the widening was convenient also for the using of the canal, and allowing vessels to pass each other in that part of the canal which they could not otherwise conveniently do. The rule was therefore made absolute, which was equivalent to the quashing of the order of justices. (b)

After the consideration of these authorities, it is almost superfluous to add, that the statutable directions in canal acts must be adhered to; such a strictness in conforming to the acts is both beneficial to the canal company, and to the public. The following case will serve as an example of this.

A canal company was empowered to make and reduce rates at a general assembly of the proprietors; but no reduction could be legally effected without the consent of the major part in value of the proprietors. The [\*312] plaintiffs made an agreement \*with the company, *but not at a general meeting*, that in consideration of their making a navigable cut from their collieries to join the company's canal, through which cut the water from the collieries was to be conveyed into the canal, and also, in consideration of their purchasing so much land as would be wanting for the navigable cut, and causing it to be vested in the company, that the plaintiffs would finish the cut, and the company should allow them to carry their coals through the cut and along the canal, for one shilling per ton, the company paying back sixpence per ton. This contract was holden to be illegal and void; for the company could not exceed the statutable line of their canal, nor raise any money beyond such as might be required for the canal contemplated by the act, nor could they reduce the tolls, except at a general assembly. This was, moreover, a

(b) 7 B. & C. 722, *Rex v. Justices of Glamorganshire*; and as to the time when these accounts should be examined and allowed, see 10 B. & C. 393, *Bridgewater Canal Company v. Black*.

speculation contrary to the intention of the Legislature, and, indeed, prejudicial to the public, whose interest it is that the tolls shall be equal upon all. Now, if *any* were favoured, the inducement to the company to reduce the tolls, *generally*, below the statute rate, is diminished. Judgment was therefore given for the defendant.(c)

By 3 Geo. 4, c. 126, s. 103, the proprietors, or trustees of the proprietors of any canal, railway, or tramroad, on which any materials for the repair of turnpike roads may be conveyed, may reduce the tolls imposed, by any act of Parliament, on the carriage of such materials, and appoint lower tolls. Such reduced tolls may be collected and recovered in the same manner as the original tolls.(d)

And although an act should authorize the reduction of tolls, and provide for the appropriation of any surplus of rates, commissioners may again raise the rates, if it should become necessary.(e)

Should there be any ambiguity in an act respecting canal tolls, the construction is to be in favour of the public, not of the adventurers. As where a canal was formed upon two levels, which were connected by a chain of locks. There was no lock upon the upper level. Various powers were given by the act with regard to rates and dues, but it was provided, that the owners of pleasure-boats might use the canal without paying dues, on condition of their not passing through any lock, and not \*carrying any goods. It was held, that this exception did not [\*313] draw the inference that toll might be demanded for navigating the upper level of the canal, where there were no locks.(f)

By 8 & 9 Vict. c. 28, canal companies are empowered to vary, reduce, and advance their tolls,(g) which are to levied by an equal charge.(h) But the act is not to apply to existing companies till a meeting of shareholders has been called, or until the matter, has in other cases, been approved by the trustees or proprietors.(i)

By sect. 5, the canal company must not raise their dues so to exceed the maximum of their profits.

And the statute 8 & 9 Vict. c. 42, enables canal companies to become

(c) 11 East, 645, Lees and others v. The Company of Proprietors of the Canal Navigation from Manchester to Aston-under-Line and Oldham.

(d) Vide ante, Chap. IV.

(e) 9 Mees. & W. 687, Good v. Penny. In this case it was likewise held, that debt might be brought in the name of the clerk to the commissioners, although there was a provision in the act to detain and sell vessels in case of the nonpayment of rates.

(f) 2 B. & Adol. 793, Stourbridge Canal Company v. Wheeley. (g) Sect. 1.

(h) Sect. 2.

(i) Sect. 3. The 4th section saves rights specifically reserved to canal companies by acts of Parliament. Sec. 6. declares that canal companies shall not be exempted from the operation of any future general act.

common carriers upon their canals, and to make equal charges accordingly.

The proprietors of docks have also a power, under various acts of Parliament, to enforce the payment of duties in consideration of the benefits which those easements confer upon the public. The same observation is here again applicable, as in the case of canal tolls, namely, that the particular statute must be consulted upon each occasion, in order to settle disputes as to the duties. And as they impose a rate upon the subject, the principle is, that they shall receive a strict construction. A ship cleared outwards from Liverpool to St. Domingo; she discharged her cargo at the latter place, and reloaded for London; there she discharged that cargo also, and sailed for Liverpool with a third cargo, laden at London. Upon her arrival at Liverpool, the question was, whether she should pay dockage duties according to the St. Domingo or the London rate. The action was brought to recover 24*l.* 8*s.* 9*d.*, being the difference between the two rates, and the clauses upon which the Court had occasion to form their judgment, were the sixth and seventh sections of the Liverpool Dock Act.<sup>(k)</sup> By the sixth section, all vessels arriving at the port of Liverpool, and trading inwards, were declared liable to pay the dockage rates, according to the rates payable from the most distant port, or place, from which they should so trade, to Liverpool.

[\*314] The seventh section, regulating the tonnage rate for one \*arrival and one departure of each ship, ordained, that such payment should take place "without any regard to any intermediate ports between which she may have traded whilst absent from Liverpool; but that such tonnage rate should, in every such case, be charged upon every such ship, upon the most distant voyage to which such ship should have traded."

The Court, after considering the effect of these sections, in connection with others relating to the subject, were of opinion, that no other than the London duty was payable. They thought that the provision respecting the most distant port, was applicable to cases where the ship traded from more places than one in the same voyage, as if the ship in question had brought goods to Liverpool from St. Domingo as well as London. There would have then been a means of comparing the distance between different ports. Then, with reference to the seventh clause, it will be best understood by comparing it with the preceding; and the meaning of both combined is, that where a vessel trades from different places, by loading partly at one place, and partly at another, and bringing home the aggregate produce of these distinct loadings, the rate is payable according to the most distant of these places. The entire cargo was from London, and the London duty could only be demanded.<sup>(l)</sup>

(k) 51 G. 3, c. 143. (Local and Personal).

(l) 5 M. & S. 323, *The Trustees of the Liverpool Docks v. Gladstone and another.*



If a duty be imposed in respect of the same voyage out and home, and a ship come home from another port, and then sail again to a foreign port, the duty is payable on both occasions, because there are two distinct voyages. Thus, a ship was built in Devonshire, and registered at Liverpool. She cleared out from Bristol to St. Vincent, and arrived from thence at the port of Liverpool. This was her first arrival there, and she paid the duties inwards. After making several voyages, she at length cleared *outwards*, with a cargo for Madeira and Jamaica; and the collector of the dock duties, against whom the action was brought, demanded and received the duty, upon her so clearing outwards. When she returned, the duty inwards was not demanded; but upon the next outward voyage it was again demanded, and paid under protest. The questions were, whether any duty were payable, except upon ships coming inwards; and then, whether the voyage out were not to be connected with the last preceding voyage inwards. The clause of the statute was, that the duties were to be paid at the time of the ship's discharge either inwards or outwards, so as no ship should be subject or liable to pay the duty but once for the same voyage both out and home, notwithstanding such ship\* may go out and return back with a lading of any goods or merchandize. [\*815] The Court of King's Bench held, upon error from the Common Pleas, that the duty was demandable in respect of the outward voyage, and the preceding inward voyage could not be united with the next outward, as it had been contended, and, indeed, decided, in the Court below. To be sure, there should be only one payment for each voyage; for a Liverpool ship might carry a cargo out, and bring another home, and other ships might bring a cargo in, and take another out; but here were two distinct voyages. Equally so it was, that the ship, although she used the port only inwards, was liable to pay whole duties upon one voyage; whereas, had she used it outwards and inwards, no more payment would have been demanded. The act imposed *one entire duty* upon each voyage if there were either an inward or outward cargo; and if both, there was to be no advance; and if one, still the ship was to pay full duty. The judgment of the Common Pleas was reversed.<sup>(m)</sup> In point of fact, therefore, the ship in question, which was a Liverpool ship, being registered there, had made one entire voyage when she returned from St. Vincent; and the duties outwards might have been legally demanded from her, upon her next voyage outwards. These duties, when assigned by virtue of the act of Parliament, are not mere chattels, but charges upon the docks; and it was accordingly held, that the auctioneer could not be called upon to pay the duty upon them, when sold in any other light than as interests in land.<sup>(n)</sup>

A vessel cleared out at Hull, with a cargo of goods for Mogadore. There she took in another cargo for London. She discharged this cargo at London, and took in a third cargo for Hull. Here the vessel was

(m) 11 East, 675, *Gildhart v. Gladstone and others*, in error. 2 Taunt. 97. S. C. in C. P.

(n) 8 Price, 180, *Rex v. Winstanley*.

held to have made two distinct voyages, and she did not fall within the exemption "from the payment of the same port or toll duties more than once for the same voyage out and home, notwithstanding such ship or vessel might go out and return with a lading of goods or merchandize." (o)

If the act of Parliament which regulates the amount of duty should not apply to all the services which are rendered by a dock company, there may be an extra compensation agreed on by convention between the parties. This is consistent with the principle, that persons who have done acts for the benefit of "commercial men should be recom-  
[\*316] pensed for so doing; and the compensation is in the nature of a toll traverse. Two actions for money had and received were brought against the defendant, as treasurer of the West India Company. The money had been paid to the officers of the company, for the wharfage, and shipping goods into lighters sent into the docks by the plaintiffs, for that purpose. The company contended, on the one hand, that they were only bound, in consideration of the rates and duties received upon importation of the goods, to deliver them, free of further charge, from their warehouses, into inland carriages. The plaintiffs insisted that they had a right, for the same compensation, to receive the goods from their warehouses, across the quays, and by means of the cranes, then into their lighters, and thus to remove them by water as well as land carriage. The clause of the statute had these words:—"Which rates or duties, &c., shall be accepted and taken for and in respect of the use and convenience of the said docks, &c., and all charges of delivering the same from the said warehouses." The Court gave judgment for the plaintiffs, observing, that the mode of delivery should be left to the election of the owner of the goods. With respect to any extraordinary trouble being incurred by the company, in the case of water carriage rather than by land conveyance, it did not appear that the Legislature looked particularly, much less solely, to the delivery by land, when the compensation came to be considered. More, however, than the mere act of safe delivery, the Court added, could not be claimed at the hands of the company; the owner of the goods was not warranted in prolonging or interrupting their passage from the warehouse to the lighter, nor need the company, after such delay, again proceed with the goods. In such a case, the company might be entitled to an ulterior compensation. (p) Upon another occasion, an action was brought against the treasurer of the West India Dock Company, for wharfage and portorage of certain rope and tar. The ship of the plaintiffs, the owners, had arrived in the docks from the West Indies, and had paid her tonnage duty, pursuant to the statute. Having unloaded her cargo, she entered the company's dock for light ships. The rope and tar were sent to the docks, for the use of the ship, and placed upon the company's wharf, and thence they were shipped by the plaintiffs servants. Previously, however, to their being shipped, demands of 2*d.* and 6*d.* respectively, for wharfage and portorage, in respect of the rope and tar,

(o) 2 Chit. Rep. 597, Kingston-upon-Hull Dock Company v. Huntington.

(p) 8 East, 16, Harden v. Smith, Schroeder v. the same.

were made; they were the usual charges, and they were reasonable, if any liability to pay them at all existed. The words of the statute,<sup>(g)</sup> which gave ships in the light \*docks permission to remain there for six months, were these:—"Together with the use of the light [\*317] dock, for any time not exceeding six months, from the time of unloading such ship." The plaintiffs contended, that they could not be said to have the use of the light dock for their ship, if they, were liable to be charged, under the name of wharfage and portorage, for all the necessary stores passed over the quays and wharfs, for the use of the ship; without which she could not be kept in repair, or fitted out for any other voyage.... The Court took the distinction to lie between stores shipped as necessities, for the present use and security of the ship, while lying in the dock, and such as were for her future use, as part of her outfit. With regard to the former, the ship would be entitled to receive them on board, free from any additional charge beyond the tonnage rate; but if the stores were intended as part of the outfit, the Court expressed themselves satisfied that the company were not restrained from charging wharfage and portorage, as for other merchandize shipped for the outward-bound voyage.<sup>(r)</sup>

Another dispute arose subsequently between the same parties. It was tried in assumpsit against the treasurer, for 169*l.* 0*s.* 6*d.*, incurred in pumping the ship and unloading the cargo, and in coopering and providing hoops and nails in the course of the unloading. It appeared, that when the ship entered the basin she was so leaky, that it was necessary to keep the pumps at work, for the preservation of the cargo; and for that purpose, either to retain the crew on board, or to hire labourers to work the pumps. The ship thus not being in a condition to wait her turn to be quayed and unloaded by rotation in the import dock, the cargo was unloaded into lighters in the outward dock; in doing which, certain coo-  
perage was required. The cargo was subsequently unladen from the lighters, upon the proper quays, by the dock company. For the expenses of hiring labourers at the pumps, the hire of the lighters, and the cooperage, and for delivering the cargo, the crew having been discharged, the action in question was brought, the company having refused to bear such expenses. The Court was so clear in favour of the defendants, that Lord Ellenborough called upon the plaintiff's counsel, and asked if he could contend, that a ship in such a leaky condition as this was, was to be nursed by the company, as though the docks were an hospital for infirm ships. The Court considered that the company had made a very fair defence. In extreme cases, three commissioners of the customs were empowered to enable ships coming with cargoes of West India produce to \*unload elsewhere than in the docks; but that alleviation does not enable the company to break it upon the rotation required by the [\*318] act in the unloading of ships within the docks. Besides, to permit the present action would be to open a door to great frauds. The postea was delivered to the defendant.<sup>(s)</sup>

(g) 39 G. 3, c. 69, s. 137.

(r) 11 East, 533, Blackett and another v. Smith.

(s) 12 East, 518, Blackett and another v. Smith, Treasurer of the West India Dock Company.

The term "port," is used in its popular sense when the limits of a place liable to the burden of dock duties require a legal construction. Therefore, Goole, which is without the port of Hull, was held not liable to such duties, although Goole and Hull might be considered as a district for the purposes of revenue.<sup>(t)</sup> But a vessel proceeding with a cargo, taken in at Goole, to Hull, is liable at Hull for tonnage.<sup>(u)</sup>

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Having now shewn that rights of water may be occasionally liable to tolls, we proceed to mention some other rates or charges to which they are also subject. The principal of these are, rates for the relief of the poor, and tithes,—or, more properly speaking, the rent-charge now payable in lieu of tithes. Canal, and other such tolls, are included in this summary, because they spring from the enjoyment of water. But inasmuch as the principle upon which rating proceeds, is the contribution of the visible profits of land to the service of the poor, a mere passage over water cannot, necessarily, be obnoxious to such a demand; and therefore, rights of navigation may be laid out of the present inquiry.<sup>(v)</sup> But this exemption will not extend to fisheries which the owner of the soil possesses, nor to canal tolls, nor to waterworks, or dock companies; for profits may be derivable from each of these properties, as connected with a right of soil; and they have been, consequently, to a certain extent, deemed rateable. Now again, to watercourses; for their value, as connected with the occupation of mills, is self-evident; and, independently of that, [\*319] they may be rated for the \*advantages which they confer upon their owners, as so much land covered with water: the legal subject of the rate being the soil itself.

Insomuch, that in a case where no money profit was derived from a reservoir, the commissioners were, nevertheless, held to have been properly rated. Certain commissioners of reservoirs, at Huddersfield had power given them to borrow money, in order to compensate the owners of mills, and for taking water. One reservoir was for the mill owners, and one for the town of H. The water rents were applied to the expenses, though it did not appear that the mill owners paid any thing, and *no profit was derivable from the reservoirs*. The sessions quashed the rate, but the Court discerned a visible advantage in this property,

Gold and silver were held not to be included under the head of "metals," where duties were imposed on copper, brass, pewter and tin, and other metals. 2 B. & Adol. 592, Casker v. Holmes.

(t) 2 B. & Adol. 43, Kingston-upon-Hull Dock Company v. Brown.

(u) 4 Id. 178, Hull Dock Company v. Priestley. S. C. 1 Nev. & M. 85; under 42 G. 3, c. xcl. s. 44. *Secus*, if a vessel come from Leeds, above Goole, and only pass the entrance into Goole. S. C.

(v) However, the owners of the ships are rateable to that parish in which the ships lie, if the port be their home. 4 T. R. 771, Rex v. White; and see 8 East, 451, R. v. Jones. But if the ship is never locally within the parish, the rate does not attach. 1 B. & Adol. 109, R. v. Shepherd.

and quashed the order of sessions, thus confirming the rate. The costs of the springs were part of the original costs in H.(w)

It seems, in the absence of any express authority upon the subject, that a mere right of fishing, without the ownership or occupation of the soil, is not the subject of a parochial rate, the party, at the same time, not being resident within the parish. It is, in effect, an incorporeal hereditament; and although, *possibly*, if annexed to land, such a right might occasion the rateability of the estate generally, in a higher proportion,(x) it is certainly not so liable as a mere privilege. This exemption is confirmed by Mr. Justice Bayley, who observed, when delivering his judgment in a recent case, that a mere incorporeal fishery does not fall within the statute 43 Eliz. as the subject of rate.(y) It follows from hence, that a common fishery is not within the rules of rateability. So again, if it be allowed, that a free fishery is such a right as may exist independently of any connexion with the soil, this, again, reasoning from the premises, is exempt from liability: and it follows as a corollary, that a piscary which is carried on in the sea, or the arms thereof, or in public rivers, *being common to all his Majesty's subjects*, is freed from a burthen of this nature. No other right of fishery, therefore, remains to be considered, excepting a several fishery, and this, it should seem, may be made contributable to the rates, whenever it can be identified with the soil. There is a very considerable authority upon this part of our subject, in which the question underwent a very full consideration. The defendant was rated to the relief of the poor for the following fishery. [\*320]

\*He, with five other persons, whose streams he rented, were the owners of "one-fourth part of all those fishings of the halves and halvendoles,(z) and of the fishing called U., with the appurtenants to the halves, due and accustomed within the River of Severn, &c.; and also of a fourth part of all royal fishes to be taken within, &c., putt fishing and wheel fishing excepted," under a certain yearly rent. From the time of the demise, he, and those under whom he claimed, had exercised the sole right of fishing in that part of the river comprised in the demise. He did not reside in the parish in which the rate was made. The sessions confirmed the rate, subject to the opinion of the Court; and they held, that this person was rateable. It appeared distinctly, they said, that these halves and halvendoles were of the nature of land, or some local limit, or something territorial. The exception of putt and wheel fishing had been relied on by the counsel for the defendant, it being contended, that as these could only be enjoyed by means of posts and stakes affixed to the soil, the soil had been, for this purpose, excepted out of the demise. The Court thought, however, that an argument of a different kind might be deducted from thence; namely, that all which was not taken away,

(w) 18 L. J., M. C. 65. Id. Q. B. 120, R. v. Longwood Churchwardens. S. C. 3 New Sess. Cas. 371.

(z) By De Grey, C. J. 2 Sir Wm. Bl. 1245, applying the case of a right of common. S. P. 4 B. & C. 753, per Holroyd, J.

(y) 1 M. & S. 655. 1 Nolan's Poor Laws, 89.

(z) *Quære*, if these words mean half of the river—*ad flum aquæ*? The sessions did not explain them. See 1 M. & S. 661, by Lord Ellenborough.

passed by the grant. Had the sessions found this to have been an easement, it might have made a difference, but this was not so; all the evidence seemed to refer to a right of soil. The order of sessions was thereupon confirmed.(a) Lord Ellenborough, in concluding his judgment, expressly observed, that he did not found his opinion on any particular description of fishery which had been evidenced by the case, but on the ground that some right of soil had passed.(b) So that a several fishery, which does not necessarily include the ownership of the soil, and is an incorporeal hereditament, where enjoyed in *alieno solo* is entitled to the exemption which we have already pointed out. The decision last cited is an authority to show, that where the fishery is connected with a property in land, it may be rated. And it should be added, that although a fishery be not rateable, yet the tithe of fish is. Therefore, where fish were titheable by custom, it was held, that the lay impropriator should be rated in respect of his tenth.(c)

In considering whether canal and other tolls or rates are liable to contribute to the relief of the poor, we must not lose sight of the principle of rateability, namely, the taxing the springing profits of a visible property. A mere tenement, \*therefore, according to the inclination [821] of the Courts at the present day, would not, as it seems, be rateable, unless indeed, there were a special provision to that effect in an act of Parliament. And clearly, if there be express words of exemption, no rate can be enforced. Questions sometimes arise as to the extent of this exemption. Thus, the proprietors of a canal were expressly exempted from the payment of all taxes, rates, &c., in respect of their own rates which they received from vessels navigating the canal; but the land occupied by the canal was, nevertheless, rated by the parish, and the company brought the case in the Court of King's Bench. It was held there, that the land was not rateable, for the canal rates and duties were received in respect of the land, of the manual labour, and of the stowage of the vessels in which goods were transported. By estimating the value of the component parts, the value of the rates and duties cumulatively was formed. In exempting the aggregate therefore, the Legislature, must have intended to exempt the component parts of which the land (rated) was one.(d) A rate on land is in effect a rate on the profits of the land, for where there are no profits, there is no beneficial occupation; and as in this case the rates and duties were exempted, there being no other profits of the land, the land itself must be considered as exempted.(e) But a house occupied by a surveyor under the trustees of a river navigation is liable to be rated, although the tolls be exempted specially by the act, and although the trustees have no beneficial interest in the navigation of the river or in the tolls. If the surveyor were to receive a

(a) 1 M. & S. 652, *Rex v. Ellis*.

(b) *Id.* 663.

(c) 3 T. R. 385, *Rex v. Carlyon*.

(d) 1 B. & A. 263, *The King against The Company of Proprietors of the Calder and Hebble Navigation*.

(e) *By Holroyd, J.*, *Id.* 269.

salary out of the tolls, and rent another house, he would be liable to be rated in respect of that.(f) We have just seen that there must be a beneficial occupation: if, therefore, canal toll be entirely devoted to public purposes, they are certainly exempt. It was attempted to be shewn, that the meaning of such a statute would be this: after deducting the expense of collection, and all the charges and burdens imposed upon property, the clear produce shall be applied to the purposes of the act. But the Court said, that there must be a beneficial operation: in this case there was, indeed, property, the subject of a rate, but no occupier. The trustee had a bare naked trust, not coupled with an interest. The commissioners of navigation were mere trustees to superintend the execution of the act, without any personal advantage.(g) However, an excess \*of expenditure beyond the receipts will not exonerate a public company from this charge. It was urged upon such an occasion, [\*322] that where there was no return of profits, in other words, no beneficial occupation, there could be no rate. But by the Court: The Company were in possession of property *prima facie* rateable, and true principle is, whether a concern be profitable *communibus annis*. As it did not appear, therefore, from the case, that the property, *communibus annis*, was not productive of profit, but only that it was unprofitable during a particular period, the rate was well imposed, notwithstanding the extraordinary expenditure.(h) A fortiori, if the trustees or commissioners of a navigation reap profit from their undertaking, they are rateable. And the rent is the criterion. A rate made upon the full amount of gross receipts would be wrong. The question is, at what sum the land will let.(i) Interest upon a mortgage may be considered in the light of rent.(k)

The East London Waterworks Company were rated in twenty-one parishes, as occupiers for mains, pipes, &c., for supplying water. The sessions confirmed the rate, and it went to arbitration. The finding for the opinion of the court was,—the amount of the gross receipts after making deductions. The following apportionment was then suggested: the whole apparatus was divided into two portions, *i. e.*, the service pipes, which profited the company directly, and the residue, which brought the water to the pipes, and thus indirectly benefited them. The second portion was rated in the ordinary way, and the amount of rate was deducted from the sum of the rateable value, and distributed to the parishes in which the parts of this portion were situate. The residue of the rateable value was apportioned among the parishes in which the direct productive portions of the work was situate, in the ratio either of the net profits, or of the gross receipts, or of the quantity of mains and pipes, and of the land occupied by them in each district. Each ratio gave the

(f) 2 Stark. 543, — *v. Armstrong and others*.

(g) 4 T. R. 730, *The King against the Commissioners of the Navigation of Salter's Load Sluice to Stanground Sluice*. S. P. 12 East, 40, *Rex v. Churchwardens and Overseers of Sculcoates*. S. P. 7 B. & C. 61, *R. v. Liverpool Inhabitants*; and see *Id.* 70, note (c), *R. v. Weaver Navigation Trustees*.

(h) 5 M. & S. 394, *The King against The Hull Dock Company*.

(i) 9 B. & C. 68, *R. v. The Trustees of the D. of Bridgewater*.

(k) 1 B. & Adol. 926, *R. v. Chaplin*.

same result. It was held, 1. That the division of the whole rateable value was rightly made, not according to the amount of fixed capital expended in each district, but according to the estimate of the rent it should yield. 2. That the second portion of the rateable value was properly deducted and distributed. 3. That generally, the residue of the rateable value would be apportioned in the ratio of the net profits in the [\*323] \*several parishes; but in this case the total expense having been taken to be common to the whole apparatus, and having been deducted from the total of the receipts in the progress of ascertaining the rateable value, the ratio of the gross receipts should be adopted, as being an index of the net profits.<sup>(l)</sup>

A company were authorized to make the Avon navigable from a certain point to another point, and to make new cuts: the usual compensation clauses were added. Then by another act they were allowed a horse towing path, with further powers of purchase. They made the cut and towing path, and made compensation at the rate of thirty years' purchase. They had no conveyance, but they made satisfaction to the land owners: the remainder of the land taken, but not used, was depastured by the adjoining land owners. It was held, that the company had such an exclusive occupation of the cuts and towing path as made them rateable.<sup>(m)</sup>

It has been assumed, that canal and other tolls are rateable; though not rateable per se, they become so when springing from or connected with land; the same observation applies to dock charges, &c. In one case, the counsel against the rate urged the Court, that the intention of the Legislature must have been to exempt the Hull Dock Company from rates and taxes by reason of the hazardous undertaking they had embarked in, but the Court did not accede to the argument, observing, that the land in question was clearly rateable before the passing of the act of Parliament, and that there were no words of exemption.<sup>(n)</sup>

Setting aside, however, the construction of general acts of Parliament, it need hardly be observed, that the principle so often adverted to of deciding cases founded on particular statutes according to their respective provisions, is applicable also to this branch of the subject. Thus, a canal was made under the 8th Geo. 3: there was no provision in that act exempting the canal from parochial assessments, and the canal was, consequently, rateable according to its improved value. The inhabitants, therefore, of the several parishes through which the canal passed had acquired a vested right to have the canal so rated: then came a subsequent act, 23 Geo. 3, which established another canal, with a special provision,

(l) 3 New Sess. Cas. 13, R. v. Mile End Old Town. S. C. 10 Q. B. 208. S. C. 16 L. J., M. C. 184. See 18 L. J., M. C. 85. Id. Q. B. 126, R. v. Hammersmith Bridge Company. The appellants, it was said, should begin the argument in this case.

(m) 11 Ad. & El. 463, Bruce v. Willis. S. C. 3 Per. & D. 220. 2 Railw. Ca. 7.

(n) 1 T. R. 219, The King against The Dock Company of Hull.



as to the mode of rating, more \*beneficial to the company than that which had been established in the case of the first canal. [\*324] In the next year the two corporations were united, and by the 58 Geo. 3, the canal was placed under one system of management. It was contended, that by the incorporation, the special mode of rating so beneficial to the company should extend to the first canal, which we have seen, was not rateable in any particular manner. But the Court were of a different opinion; for if the whole navigation were to be regulated by the same rule of rateability, the vested rights of persons not within the contemplation of the act would be invaded. The order of sessions, therefore, establishing the general rate, was confirmed.(o) Thus, again, the Dudley Canal Company was incorporated by virtue of three several consecutive statutes; but no special mode of rating was pointed out by any of them. By a fourth statute, a reincorporation was ordained, with a power for the first time awarded to the company to make collateral cuts. There was, however, a clause to this effect: that the proprietors should from time to time be rated to all Parliamentary and parochial assessments in respect of the land of the company, their warehouses and buildings, as other lands, grounds and buildings, lying near to the canal and collateral cuts, were or should be rated. And upon this, the Court, according to the principle in the last case, held that the clause was not to be construed retrospectively, for if that were so, the right of a parish, which had assessed the canal and included in the valuation the profits derived from the company's tonnage dues, would be divested.(p)

But on the other hand, the Courts will give effect to statutes which operate to relieve a canal company, if they see occasion.

An act declared that the company in question should not be taxed or assessed for the navigation, or the profits thereof, at any place, except Sheffield or Doncaster. A subsequent act permitted certain new cuts to be "taken as part of the navigation of the River Dun," and that all provisions, &c., powers and authorities of former acts should be comprehended in this. Here, after much argument, it was held, although the Court entertained much doubt, that the company were exempt from poor \*rates, although no part of the navigation was in Sheffield, that [\*325] they were exempt in respect of the new cuts, although not one of these latter was either in Sheffield or Doncaster, and the words, "taken as part of the navigation," were, without more, sufficient to exempt the new cuts

(o) 2 B. & A. 570, *The King against The Company of Proprietors of the Birmingham Canal Navigation*. The principal of this decision has been recognised in a subsequent case, where it was held that the company had no right to take water from mines, the produce of which was carried along the canal under 8 G. 3, c. 38. 5 B. & C. 821, *Finch v. Birmingham Canal Company*. S. C. 8 D. & R. 680.

(p) 7 D. & R. 466, *The King against The Company of Proprietors of the Dudley Canal Navigation*. S. C. 7 B. & C. 236, nom. *The King against Kingswinford*. See 20 L. J., M. C. 144, where Coleridge, J., said, that, in its broad principle, the occupation of a railway company did not differ from that of a canal company.

from assessment. The order of session quashing the rate was confirmed.(g)

The Hull Dock Company were empowered to make a basin or dock, wharves, &c., and to take tolls, in respect of the same. The Port of Hull consists of the River Hull or harbour, and part of the Humber, neither being the property of the dock company, and of three docks and a basin, the property of the company. All vessels frequenting the port, pass through that portion of the Humber which is within the Port of Hull. They pay tonnage and are divided into:—1. Those vessels which discharge their cargo in the Humber, without entering the River Hull, basin, or docks. 2 Those which discharge their cargo in the Hull without entering the basin or docks. 3. Those using the basin without using the docks. 4. Those passing through the Hull into the docks. 5. Those passing through the basin into the docks. All the tonnage dues are collected at the custom house. The Court held the company not rateable upon the 1st and 2nd classes, but that they were liable in respect of the rest.(r)

It was contended that a company were liable to be rated in regard of the improved value of their land under the following circumstances. There were two acts applicable to their canal. The first declared, that the lands and buildings they occupied should be rated as if they were the property of individuals in their natural capacity. The second directed the imposition of assessments in each parish through which the canal flowed, in proportion to the length of the canal and cuts respectively. The session confirmed a rate assessing the company at the improved value, notwithstanding the first statute; and upon appeal, the counsel in support of the rate contended that 1st, as land is rated according to its improved value when in the hands of individuals, and as the improved value in the present case was the toll, the company could not be otherwise rated; 2ndly, that as the rates were to be levied according to the length of the canal in each parish, the distribution must be with reference to the tolls. But the Court were against the rate; they thought the statutes quite intelligible per se, the first meaning, that the land should be rated as if it remained in the hands of individual farmers for the ordinary purposes of agriculture; \*and the second, that the rate should be apportioned between [\*326] the different parishes, without varying the extent of the company's liability.(s) Mr. Justice Abbott said too, that there was another objec-

(g) 2 Ad. & El. 551, R. v. Barneby Dun. S. C. 4 Nev. & M. 436.

(r) 1 New Sess. Cas. 621, R. v. Hull Dock Company. S. C. 7 Q. B. 2.

(s) 1 B. & A. 289, The King against The Company of Proprietors of the Grand Junction Canal. S. P. 6 East, 325, The King against The Leeds and Liverpool Canal Company. S. P. 6 B. & C. 720, Rex v. The Regent's Canal Company. By the act of Parliament regulating this latter canal, wharfs were ordered to be rated to the relief of the poor. The company had a piece of land adjoining the private yard of a timber merchant. It was merely natural ground, and there was no building or erection made there so as to constitute a wharf in the ordinary sense. Upon this land the timber merchant landed his timber. He paid no rent of any sort for it, but the rates and duties of the company were increased by the use of the easement of landing. The court held, that this was not a wharf within the meaning of the act, and so not liable to be rated.

tion to the rate, inasmuch as it was imposed on the canal, and not on the rates, duties, and personal estate of the company, as provided by the act. But although they might impose rates in an amended form, the learned Judge added, that they could not ultimately succeed, for the reasons above referred to.<sup>(t)</sup> Again, a canal act directed, that the company should be rated to all parochial taxes in respect of their lands, in the same proportion as other lands lying near the same should be rated, if in the hands of individuals in their natural capacity. And a subsequent act relating to the same canal, after re-enacting the above provisions, went on to say, that the company might agree with any owner of lands adjoining their lands, taken for the purpose of the navigation, for an exemption from all rates in respect of such last-mentioned lands, so as to charge the same upon the adjoining lands; in which case the rates should be charged upon the adjoining lands, according to the agreement, and then the lands belonging to the navigation were to be held exempted and discharged. Upon this it was contended, notwithstanding the former decision, that the tolls were to be taken into consideration in fixing the rate, the first statute being only confirmatory of what the common law would have directed, namely, that the rate should be equally laid upon all the property assessed. It was further argued, that the latter statute repealed the first, inasmuch as the words "as the same would be rateable if they were the property of individuals in their natural capacity," were there omitted. The first point was merely to call for a revision of the former opinion of the Court, and they declare themselves satisfied, as to that, with their original decision which we have just cited. As to the second, the Court observed, that had the Legislature intended any repeal, it would have been expressed in unambiguous language. The power given was to make specific bargains for the purchase of lands exempt from rates, and to shift the rates from lands taken by the company, placing them upon other lands in the hand of individual \*proprietors. Then the value at the time of the sale would remain the rateable value, and there [\*327] was no reason for supposing that a different rate would be payable in the absence of any such bargain.<sup>(u)</sup>

To the same effect is *R. v. the Chelmer and Blackwater Navigation Company*.<sup>(v)</sup> By an act for making a navigable communication between two places therein mentioned, a company was formed, and authorized to purchase lands, &c., for the use of the navigation, and to make and maintain the same. The act then directed, that the company should be rated and charged to all Parliamentary and parochial taxes, rates, and assessments for any lands to be purchased or taken, or warehouses or other buildings to be erected by them, in pursuance of that act, in the same proportion as other lands and buildings adjoining to or lying near the same, were or should be rated or charged. It was held, that the com-

(t) 1 B. & A. 298.

(u) 5 B. & C. 476. *The King against The Inhabitants of St. Peter the Great*, in the county of Worcester. S. C. 3 D. & R. 331.

(v) 2 B. & Adol. 14. To the same effect. 7 Ad. & El. 671, *R. v. Leeds and Liverpool Canal Company*. S. C. 2 Nev. & P. 540.

pany were liable to be rated for their lands and buildings at the same value as other adjacent lands and buildings, and not according to the improved value derived from their being used for the purposes of navigation. -

So where there were similar provisions in a canal act, followed by a local and personal act, which directed a fair and equal assessment generally, and then the County Rate Act directed that a fair and equal county rate should be made according to the full and fair annual value of property; it was held, that the county rate was a parochial tax within the first act; that the first act was not repealed by either of the others, and, therefore, that the company were not liable to be assessed at an increased value. There was no power to make a distinct rate.(w)

The land occupied by the original line of the canal is to be rated as land, without reference to its use as a canal. The lands mean the land of the canal covered with water. And the branches of the canal are to be considered as part of the whole navigation.(x) Wharfs erected by a company are to be rated according to their annual letting value.(y)

The London Dock Company were assessed for property in the sum of 975*l.*; it was a rate of 1*s.* 3*d.* in the pound upon 15,600 annual value. [328] The sessions reduced the rate to 139*l.* 8*s.* 7*d.* \*In pursuance of an act of Parliament, a basin, a large dock, quay, &c., had been erected by the company, and had been so far completed, as to be fit and proper for the reception of certain goods. Works were also proceeding so as to complete the undertaking with the greatest possible expedition. The company had paid from Midsummer, 1801, until the making of the rate appealed against, 139*l.* 8*s.* 7*d.* quarterly, being calculated on the old premises which the company had destroyed, and being at the rate of 8½*d.* in the pound per quarter upon 3,966*l.*, the average rental calculated upon the ten years preceding the act of Parliament, and the rate appealed against being at the rate of 1*s.* 3*d.* in the pound upon a rental of 15,600*l.* The Court, held, that the assessment appealed against was bad, being at a higher rate than the Legislature had warranted, but that the sessions were also wrong, because they had reduced the sum to what a rate of 8½*d.* in the pound would produce upon a rental of 3,966*l.*, instead of reducing it to what a rate of 8½*d.* in the pound would produce on a rental of 15,600*l.* This latter sum the Court assumed to be the fair rental of the productive work.(z)

If a canal be used, the profits arising therefrom are rateable; a compensation duty was, therefore, considered as liable, where one company permitted another to have the enjoyment of their water. The Oxford Canal Company were authorized to take a certain mileage duty. The Grand

(w) 4 Railw. Ca. 315, R. v. Aylesbury Inhabitants.

(x) R. v. Leeds and Liverpool Canal Company, ut supra.

(y) S. C.

(z) 9 East, 127, Rex v. St. George, Middlesex Inhabitants. See the statute in question, 39 & 40 G. 3, c. 47.

Junction Canal was created by a subsequent act, and as the proprietors of the Oxford Canal considered that the new company would be prejudicial to them, it was arranged, that an indemnity should be made them as a compensation for the supposed injury. Instead of the mileage duty payable to the Oxford Canal Proprietors, they were authorized to take so much per ton for coals and other goods which should pass from the Oxford into the intended new canal, or *visa versa*, or from any other navigable canal through the Oxford into the new canal, without any regard to the distance the same should pass upon the Oxford Canal. The Oxford Canal Company were rated in respect of this compensation rate, and the court held, that they were not liable to be assessed. It was attempted, in argument on their behalf, to shew, that the compensation was merely for passing in and out of the canal, that the tolls became due for the use of the sluice, and so rateable only in the parish of Braunston where the sluice is situate. But Mr. Justice Bayley said, that there was a fallacy in those premises, for the compensation was given in regard of the use of the canal, not for passing into it or out of it. In point of fact, "although called a compensation duty, this was a rate [329] for coals passing along the canal.(a)

Having now shewn that canal, dock, and water companies are rateable, but that they may be exempted by acts of Parliament, having shewn the force and extent of these exemptions, together with the construction of the local statutes which apply to the subject, it remains to point out more particularly the place where the rate is to be made, and the proportions must be attended to in distributing it.

There is this difference between a sluice and a navigation : in the former case the proprietor must contribute to the relief of the poor in that parish where the sluice is situate, but in the latter the land is to be rated to the relief of the poor of that parish where it is productive of profit to the proprietor, and in proportion to that profit, which may be considered as in the nature of a rent received by the proprietor for the use of his land within the parish.(b) It was formerly holden, that the tolls of a canal navigation were assessable in the parish where they became due, upon the completion of the voyage.(c) But the decisions took place be-

(a) 4 B. & C. 76, *The King against The Company of Proprietors of the Oxford Canal Navigation*. See also 10 B. & C. 163, *R. v. Oxford Canal Company*, where the liabilities of the company were further settled. The trustees of the London Bridge Works were held liable under the Riot Act, 1 G. 1, st. 2, c. 5, s. 6, on the ground that all persons having personal property within the district assessed were rateable as inhabitants, whether residents or not, and the Court of Exchequer Chamber, which reversed the judgment of the Court of King's Bench declared the construction of this statute to be widely different from that of the 43 Elis. The Riot Act speaks of ability in general, and not of specified property as liable to the rate. Caldec. 15, *Atkins and others v. Davies*.

(b) 1 B. & C. 550, by *Abbott, C. J., Cowp. 581, Rex v. Cardington Inhabitants*. The sluices were local and visible property, producing profit within the parish.

(c) 2 T. R. 660, *Rex v. Aire and Calder Navigation*. 4 T. R. 543, *Rex v. Page*. 1 Nolan's Poor Laws, 107, S. C. 8 T. R. 340, *Rex v. Staffordshire and Worcestershire Canal Navigation*. 5 East, 325, *Rex v. Leeds and Liverpool Canal Company*.

fore the case of *Rex v. Nicholson*(*d*) was determined, and in which the Court resolved that tolls per se were not rateable. And *R. v. Nicholson* was recognised in a subsequent case, where the Court decided that tolls per se were not rateable.(*e*) It therefore became necessary to adopt a new rule, because, although some rateability must be incurred at the place where the voyage finishes, there being the use of the canal at that spot, yet the proportion would be highly unequal, estimating the rateability as arising [*\*330*] from the occupation \*of land according to the modern cases. And therefore canal tolls are now deemed to be rateable in every parish through which the canal passes in respect of the land there situate, and so used for the canal.

This was, in effect, only reconciling the principle of cases concerning canals with that which respects other rateable properties. For the difficulty originally was, how to rate tolls *quæ* tolls; as soon as it was held that tolls per se were not rateable, the original principle of rateability in respect of land became extended. Thus it had been resolved, that the tolls arising from a sluice were rateable in the parish where it was erected, although the proprietor resided elsewhere, and the tolls were collected in another parish.(*f*) Some years afterwards, a barge-way and toll-gate in the Hamlet of Hampton Wick, which had been purchased by the City of London, were rated to the relief of the poor in that hamlet; for such part of the tolls as became due there, the tolls being collected in another parish; and it was contended, that the corporation were not rateable, on the ground that if so, they might be rated for the same tolls in each of the several districts through which the river passed; and it was added, that it would be impossible to ascertain the exact proportion which might become due in each. But the Court held, that the corporation was rateable; true it was, they were not called on to say how much the city should be taxed in one parish, or how much in another, for the city had, in fact, the ownership and inheritance of the soil, the subject-matter of the rate; and they confirmed the order of sessions.(*g*) Now, here the principle respecting *land* was clearly recognised, and the only difference between this and cases on canal navigation would be, that the canal is rateable *in proportion along its whole line*, as we shall proceed to prove.

The principle was more clearly adopted in a case where the Corporation of Bath were assessed, as occupiers of certain springs and reservoirs. An act of Parliament gave them authority to convey water from the springs in the neighbourhood to the city. The Court held, that they were not only liable to be rated in respect to these springs, but also for the reservoirs made by them in the neighbouring parishes, as for *land*

(*d*) 12 East, 330.

(*e*) 6 M. & S. 400, *R. v. St. Mary's Leicester*. Nolan, 90, *R. v. Canal Navigation*.

(*f*) Cowp. 581, *Rex v. Oardington Inhabitants*.

(*g*) 4 T. R. 21, *the King against The Mayor, &c. of London*.

occupied by them. And the Court resolved further, that the corporation were not rateable for the whole of the entire profit in the parish where the springs were conducted into the reservoirs, because a proportion of the profit accrued to them from aqueducts and pipes underground, and laid into the soil of *other* parishes. \*The rate imposed [\*331] upon them to the full amount of the profits in the parish whence the springs issued. It was quite clear, the Court observed, that the corporation were not residents or inhabitants within the statute of 43 Eliz., and also that they were rateable as occupiers of land where the springs arose; but the main question was, whether they should be rated there for all their profits. As the Corporation of Bath used so large a portion of their apparatus in other parishes, in the soil of which that corporation were authorized to lay their pipes and aqueducts, it would be impossible to say, that they ought to be rated solely in the first-mentioned parish. The rate was therefore quashed.<sup>(h)</sup>

It is very easy to discern from hence, that as soon as tolls were held rateable only in respect of land, they must come within the principle of the preceding case, and so it happened. Thomas Milton was rated for "river tonnage at 100*l*.—6*l*." The sessions confirmed the rate. The river navigation in question extended through several parishes, and certain tonnage dues became due along the line. The appellant was rated for the whole amount of the dues in the parish which imposed the assessment, and he contended, that he was only proportionally liable. The Court were quite clear against the rate, for the profits accrued in respect not only of the use of that part of the navigation which was within the parish in question, but also from the use of the other parts of the navigation situate in the different parishes through which the goods had passed. To say that the tonnage dues were subject to this rate, would be to overturn the case which had decided that tolls *per se* were not rateable. The order was therefore quashed.<sup>(i)</sup>

Again, where the proprietors of an inland navigation, which extended through several parishes, were assessed in one to the entire amount of their tolls, the Court held, that the rate could not be supported, for the proprietor of the navigation ought not to be assessed at that amount in any one of the parishes through which the canal might pass.<sup>(k)</sup> And, according to the above principle, although no dues be received in any one particular parish, yet that parish is liable to contribute in proportion to the profits upon the whole line of navigation.<sup>(l)</sup>

(A) 14 East, 609, *The King against The Mayor, Aldermen, and Corporation of Bath*. S. P. 1 M. & S. 634, *Rex v. Rochdale Waterworks Company*.

(i) 3 B. & A. 112, *Rex v. Milton*.

(k) *Rex v. Palmer*, 1 B. & C. 546.

(l) *Id.* 551, *Rex v. The Earl of Portmore and another*. See also *Id.* 545, *The King against The Company of Proprietors of the Trent and Mersey Navigation*. In this last case the rate was admitted to be good, because the company were rated for a certain number of acres of land situate within the township, through which part of the canal passed, producing annual profit exceeding the sum in res-

[\*332] \*So it was when the proprietors of certain mills in H. were permitted to take tolls in L. as a compensation for loss of water. It was held, that they could not be rated in respect of such tolls in H. (m) And it is so especially where an act contemplates the unproductiveness of an undertaking for some time by reason of the expense. (n)

It is worthy of remark here, that although tolls are not rateable per se, yet they are so, as we have shewn, when connected with land; and it may be added, that a lock has been considered a real and substantial property, so as to warrant a rateability of tolls received in respect of it. It was argued, that such a rate would be upon the dues payable at the lock, and not upon the lock itself; and thus as tolls had been held not rateable, that these profits were exempt. But the Court considered, that the lock, in this case, was a thing locally situate in the township, and producing profit; and that the addition of dues or rates was merely giving other names for the same subject. (o)

Indeed, as to the case of the King against the Aire and Calder Navigation (which, as far as it related to assessing the whole amount of profits in two parishes, according to the proportion collected in several intervening parishes, has been overruled,) Lord Ellenborough took an occasion to observe, at another time, that the undertakers of that navigation had real property in the parishes where the tolls were collected, that the rate was upon the tolls conjoined with that property, which property was rendered so much more productive by reason of the tolls collected there. (p) So that, in all the cases, however erroneously some might have been decided upon other grounds, it is clear, that the principle of rating land was recognised as far as it was possible. (q)

[\*333] \*Having now pointed out the place where the respective dues above alluded to may be demanded, it remains to add a few words respecting the proportion of assessment. And this to a certain extent has been explained already, because we have shewn, that a canal company is rateable in each parish through which their water runs, according to the amount of their general profits. Looking to the land covered with water as the guide, the rate is demandable according to the proportion of such land used for the purposes of navigation. There is, however, an-

pect of which they were assessed. It is difficult to apply this reasoning: the rate might have been right in this particular case; but as the principle is, that the rateability is to be in proportion to the profits along the whole line of canal, it might follow that the profits of a company might exceed their assessment in one parish, and yet be quite out of proportion to such as should be received in other parishes. S. P. 9 B. & C. 820, *R. v. Lower Milton*: and see 1 B. & Adol. 113, *R. v. Barnes*.

(m) 3 B. & Adol. 533, *R. v. Aire and Calder Navigation Company*. S. P. 1 Q. B. 535, *R. v. Bristol Dock Company*, 2 Railw. Ca. 571. S. P. 4 Ad. & El. 40, *R. v. Woking*. S. C. 5 Nev. & M. 395. S. C. 1 Gale & D. 76.

(n) *R. v. Bristol Dock Company*, ut supra.

(o) 12 East, 324, *Rex v. Sir A. Macdonald*. (p) 12 East, 337.

(q) See also 4 Ad. & El. 916, *Colebrooke v. Tickell*. S. C. 6 Nev. & M. 483.



ther principle of proportion worthy of attention, and it is this: admitting that the company are rateable throughout all the parishes where their property lies, whether they collect the tolls in one of those parishes, or not, or whether, in fact, not in any one—still are they to be rated in respect of the improved value which the land has attained in consequence of the canal, or as mere soil unconnected with the consideration of any materially profitable right? Now, many acts of Parliament have been referred to, in which it has been expressly declared, for the benefit of canal companies, whose exertions tend very much to the public convenience, that land used for canals shall be rated as land used for husbandry purposes, and not in respect of its improved value. But in the absence of any such provision, it is quite clear, that as the land proportionally increases in real value, so it shall be rated higher in proportion. The New River Company were rated for land in Chadwell Mead, in their occupation; which land, without the spring rising there, and if not covered with water, was found by the sessions to be of the annual value of 5*l.*; but connected with the advantage derived from the use of the spring, were estimated at 300*l.* per annum. It appeared, that none of the profits became due, or were received in the parish which imposed the rate; and it was therefore contended, that here was no beneficial occupation so as to charge the company. The Court observed, that they had no concern with the quantum of the rate; the sessions might, or might not, have rated the adjacent property too highly; but the question was, whether the land, which included a valuable spring of water, was to be charged in a more advanced proportion, by reason of its increased profits. They gave judgment in favour of the rate, and Lord Ellenborough observed, that in *Rex v. The Corporation of Bath*, it had been assumed in the decision, that the water was the subject of rate in the parish where it was impounded in the reservoirs.(*r*)

\*Lands are, in fact, rated according to the amount which can be obtained by letting them at a rent; and this rule has been said to [*\*384*] be a good criterion, in order to ascertain the amount of a rate.(*s*) And hence, it should seem, that whether it be a right of common, or a right of way, or of fishery, or a canal property which is attached to land, such land may be rated according to the value which the profit or easement may happen to confer upon it; and if the test of this principle be applied, the fact, that the place where the common and way may be enjoyed, is quite distinct from the premises to which they are appurtenant, will probably make no difference. Consequently, incorporeal hereditaments, although enjoyed at a distance from the land to which they belong,(*t*) will raise the value of property, so as to make it the subject of a higher rate, than it would be if considered independently of them. But as soon as

(*r*) 1 M. & S. 503, *Rex v. The Governor and Company of the New River*. See also *Camp* 619, *R. v. Miller*. 4 Ad. & El. 40. 5 Nev. & M. 395, *R. v. Woking*.

(*s*) 4 B. & C. 82, by *Abbott, C. J.*, 9 B. & C. 68, *Rex v. The Trustees of the Duke of Bridgewater*. Id. 820, *R. v. Lower Milton*. 4 B. & Adol. 61, *R. v. Adams*.

(*t*) For instance, common land in another parish. See 2 Sir W. Bl. 1245, by *De Grey, C. J.*, and 1 *Nolan's Poor Laws*, p. 81, n. (5.)

the ownership of the land comes to be considered as distinct from the water over which these rights are claimed, the privileges in question come under the denomination of easements, and consequently cannot be rated. So that where certain navigation proprietors were rated as owners and occupiers of land taken and used for the navigation of the Rivers Mersey and Irwell, and for towing paths, locks, and tonnage, the Court quashed the rate. For these persons could not be rateable for the ancient bed of the navigable part of the river. Still, however, the Court said, that they were rateable for new cuts made through the mill of which they had been the purchasers; and, moreover, that they were also liable for the locks. The order of sessions was accordingly quashed.(u)

Again, where an act of Parliament, enabled certain undertakers to convey in fee or by way of mortgage, as well the said navigation, &c.; it was held, that the word "navigation," imported an incorporeal hereditament, for the prior act had given the undertakers an incorporeal hereditament in the bed of the river. The undertakers were, therefore, not rateable in this respect.(v)

But the new cuts are rateable. As where a company \*made a river [335] navigable, and made a cut, lock, and horse towing path in respect of which they took tolls. They had power to purchase land, but the absence of actual conveyances was held not to reduce the ownership of a mere easement. They were occupiers of the land in question.(w) So where the Chelsea Waterworks Company made new pipes and reservoirs, they were held rateable as occupiers of the reservoirs, as well as for the occupation of land below the surface by their pipes, although the Ranger of St. James's Park was rated for the herbage above.(x)

Rates, tolls, &c., were not to be rated, but lands and grounds were to be rated as if they had remained in their former state. It was held, that a canal company might be rated at the fluctuating value of the adjacent lands and buildings, and not at the value which they bore when the act was passed; and that the value of the adjacent land was to be estimated from whatever source it might arise, and that the increase of value arising from the canal ought not to be excluded from the calculation.(y)

There is one other principle in rating these properties, which it is desirable to mention; and it is, that the assessment upon a company should not be made upon the profits in the aggregate, without first deducting the sum which they are liable to pay for poor's rate. The Hull Dock

(u) 9 B. & C. 95, *Rex v. The Company of Proprietors of the Mersey and Irwell Navigation*. Id. 114, *Rex v. Thomas*, S. P. S. C. nom. R. v. *Avon Company*, 4 M. & Ry. 23. 7 B. & C. 70, note (c), *Rex v. River Weaver Navigation*, S. P.

(v) 9 B. & C. 820, *R. v. Aire and Calder Navigation*.

(w) 2 Railw. Cas. 7, *Bath River Navigation v. Willis and others*.

(x) 5 B. & Adol. 156, *R. v. Chelsea Waterworks Company*.

(y) 3 Ad. & El. 619, *R. v. Monmouth Canal Company*. S. C. 5 Nev. & M. 68. See 3 Ad. & El. 640, *Sirhowy Tramroad Company v. Jones and others*, and *Homfray v. Jones*.

company were assessed to the poor's rate in the sum of 8,900*l.*, their net profits, after making a fair allowance in respect of repairs and other expenses, but without making any deduction in respect of the sum with which they were chargeable to the rate. That sum amounted to 2,225*l.* If that amount ought to have been deducted, the net profits of the company would amount to 6,674*l.* only, or thereabouts. The sessions confirmed the rate so made on the full profits, without deducting the rate. It was contended, that such a deduction was new in principle, and had not been before made; but the Court quashed the session's order. Other real property, they observed, was rated at three-fourths, or any other part of its value, deductions being virtually made in respect of parochial demands, and there was no reason why this company should not be charged in the same proportion. Land intrinsically worth 40*l.* a year can only pay rent of 30*l.*, if it is to pay 10*l.* per annum in other ways; and in estimating a rent, both landlord and tenant look to the value of the thing on one hand, and \*to the outgoings on the other; and the outgoings must be deducted from the value, before the rent [\*336] can be properly fixed. The Court added, that the suggestion in the case (what we have stated above) was clearly wrong, for if 2,225*l.*, the present rate, were deducted from 8,900*l.*, the rate upon 6,675*l.* only would leave part of the rateable proportion of 8,900*l.* free from rate. The allowance should be so made, as that the sum upon which the annual rates were made might, with the amount of the rate, make up the 8,900*l.* The sum, according to the present rate, would be 7,120*l.*, and the sum to be paid by the company, 1,780*l.* The Court further decided, upon this occasion, that a lessee whose under-tenants had been excused from rates, by reason of their poverty, was not liable to be assessed; for as the owner fixes his rent upon the supposition that the rate is his tenant's burden, it would not be right to make the landlord surety for the tenant. The rate was, therefore, directed to be reduced to 1,780*l.*, and the order of the session confirming the rate was quashed.(z)

So, upon another occasion, the sums paid for poor's rates, for the expense of collecting the tolls, for repairing the banks of the canal, and for supplying it with water, were ordered to be deducted before the amount of the rate was fixed.(a) So again, repairing expenses, the expenses necessary to the carrying on of the undertaking, and a per centage equal to a reasonable tenant right profit were allowed to be deducted. But no deductions were allowed in respect of burthens imposed upon the profits of the navigation, or compensation payable to the owners of the property injured by the navigation.(b)

A dam which upholds the water of the river is part of the machinery which produces the rate, and for this the company are not rateable.(c)

(z) 3 B. & C. 516, *Rex v. The Hull Dock Company*.

(a) 10 B. & C. 163, *R. v. Oxford Canal Company*. To the same effect, 9 B. & C. 820, *R. v. Lower Milton*. 1 B. & Adol. 926, *R. v. Chaplin*.

(b) 4 Ad. & El. 40, *R. v. Woking*. S. C. 5 Nev. & M. 395.

(c) 3 B. & Adol. 139, *R. v. Aire and Calder Navigation*.

So where an occupier of land requires protection from floods, and is consequently subject to a rate, he may be rated the same as other occupiers of land in the same parish who are not rateable to the sewage, but still minus the rate. The sewers' rates constitute an outgoing which diminishes the annual profit, whoever pays it, and the value must be taken accordingly.(d)

[\*337] Rateability, upon other occasions than for the relief of the \*poor, must be considered with reference to the statute which imposes the tax. A water company at Manchester were held to be exempted under the following circumstances. An act was passed for the better cleansing, lighting, watching, and regulating the Towns of Manchester and Salford, and the defendants assessed in respect of their pipes, trunks, apparatus, works, and *tenements*. They had liberty to break up the soil for the purposes of laying down their pipes, and conveying water; and the question was, whether this privilege constituted a tenement within the meaning of the act. Lands, in general, it was understood, were not intended to be rated. But it was contended in support of the rate, that the word "tenement" was of a more extensive signification than land, and that the right exercised by the company implied a dominion over the land, thus constituting a tenement; whilst, on the other hand, it was said, that the company had a mere license of removing the land for the purpose of laying their pipes, and so had a mere easement only. The Court adverted to the principle of the act, in giving judgment against the rate. The principle was, that the description of property mentioned should be sufficiently protected. And thus the words, "messuages or *tenements*," "lodgings or *tenements*," were introduced. So gardens and garden-grounds were comprehended, for the object of the statutes was to give security and accommodation to the residents and to their property. But the word "lands" was omitted, and therefore lands were not to be the subject of a rate. So were pasture grounds, and quarries, because, though included in the 48 Eliz. as affording income, and so supplying the means of contribution, those properties would derive no material equivalent or protection from the act. The Court considered, consequently, that the word, "tenement" was here used in a very limited sense, and the order of sessions was quashed, the company's apparatus being expunged from the rate.(e)

An act directed that certain commissioners of reservoirs should not be rated till the reservoirs should be in use. Only one reservoir having been completed out of three, it was objected that no rate was payable because the whole was not completed. Alderson, B. I think the rates are separate, not general. And by Rolfe, B. Each class of works bene-

(d) 4 Id. 61, *Rex v. Adams*. Diss. Lord Tenterden, who died before judgment.

(e) 1 B. & C. 630, *Rex v. The Company of Proprietors of the Manchester and Salford Waterworks*. As to corporations, see the stat. 5 & 6 W. 4, c. 76, s. 92. 12 Ad. & El. 2, *R. v. Exminster*. S. C. 4. P. & Dav. 69. 4 & 5 Vict. c. 48.

fits a particular class of individuals. Judgment was given for the defendants upon a demurrer to a \*replication in trespass,<sup>(f)</sup> and the judgment was affirmed in error.<sup>(g)</sup> [\*338]

Some of the kinds of property enumerated in this Treatise, are liable to the burthen of tithes. We shall shew, that fish may be the subject of such a charge; and as mention has already been made of mills, on account of their close connection with rights of water, it may not be improper to explain under what circumstances they also may be compelled to contribute towards the parson's maintenance. The tithes, both of fish and of mills, are considered as *great tithes*.

First, with respect to fish.

By the Tithe Commutation Act (6 & 7 Wm. 4, c. 71, s. 90), nothing in the act shall extend to the tithes of fish or of fishing, unless by special provision, to be inserted in some parochial agreement, and specially approved by the commissioners. Nor shall it extend to any personal tithes other than the tithes of mills.

It is worthy of observation, that the foundation of the parson's claim to receive a tithe for fish is custom. Whether the fish be caught in the sea, or in a public river, or in a several fishery, or a store pond, or inclosed river, the same principle prevails, that the profit is not titheable otherwise than by an usage to that effect. Fish, therefore, are not thus chargeable *de jure*, for tithes *de jure* arise from such fruits of the earth as renew annually, or from the profit which accrues from the labour of a man.

Further, the usual division of tithes is thus: personal, predial, and mixed. The tithe of fish caught in the sea, or in open rivers, is called a personal tithe; that of fish taken in private waters, may be said to be a mixed tithe.

Dr. Burn observes, that personal tithes are payable only by a special custom; and, perhaps, are paid nowhere in England, except for fish caught in the sea,<sup>(h)</sup> and for corn mills.<sup>(i)</sup> And the mixed tithe, as it regards fish, is payable also, as we above mentioned, by custom alone. It follows from hence, that the tenth part of fish taken in private rivers or ponds (where \*titheable by custom,) should be set out in kind, according to the common law; for the statute of Edward VI. extends to predial tithes only,<sup>(k)</sup> and the safer course is, to give

(f) 1 Exch. 177, *Sidebottom v. Commissioners of Glossop Reservoirs*.

(g) *Id.* 611.

(h) And public rivers might have been added. See 1 Ro. Ab 636, pl. 7.

(i) Ecclesiastical Law, vol. iii. p. 521; but see 6 & 7 W. 4, c. 71, s. 90.

(k) It is declared by 2 & 3 Ed. 6, c. 13, s. 11, that the act shall not extend to any parish which stands upon and towards the sea coasts, the commodities and occupying whereof consists chiefly in fishing, and have by reason thereof used to

notice of the setting it out. The personal tithe, being a tenth part of the clear profits arising over and above all incident charges, is a payment in money, unless there be an express custom to the contrary.

It was said by the Court in an old case, that the parson could not have the tithes of fishes taken in the sea, because it is not within any parish.<sup>(l)</sup> And again, that no tithes should be paid in kind, without a custom, for any fish taken in the high sea out of any parish.<sup>(m)</sup> These opinions, however, were delivered, assuming that no custom existed; for, first, it will appear presently, that fish, taken from the sea, may be tithed by custom, and next, that by a special custom they may be set out in kind. A prohibition was applied for to stay a suit upon an appeal here to the delegates from a sentence in Ireland, for tithes of fish taken in the sea, because fish in the sea were *feræ naturæ*, and so not titheable, and because no spiritual person could say, that the fish were taken within his parish. But the prohibition was denied, for, by Jones, J., tithes of fishes are usually paid in Ireland; and it was said, that tithes were payable in Cornwall, for fishing in the sea, to the parson of the parish where they are landed, and that it was the custom in Yarmouth to pay tithes for herrings.<sup>(n)</sup> And for salmons also in the River of Exeter.<sup>(o)</sup> It was said moreover, in the same case, that tithes personal taken in the sea, out of any parish, are due deductis expensis, and that they are not tithes in kind.<sup>(p)</sup> So it had previously been laid down by Mr. Justice Doderidge that tithes of fish taken at Island, or of herrings or pilchards upon the sea, were personal tithes.<sup>(q)</sup> It had been further resolved, that inasmuch as the right to tithe sea fish at all, depends wholly upon custom, an usage to take them in any particular manner, or even to take less than the tenth part, is a good usage. Thus, a prohibition was applied for, and a custom [\*840] was surmised, that the owner of the fishing-boat had one moiety of the fish, and the fishermen the other moiety, and that the owner had been accustomed to pay the tenth of his moiety in discharge of all. The Court held this to be a good surmise, for as the parson, of common right had no claim to the imposition, if he availed himself of a custom, it was necessary that he should abide by the custom; consequently the tenth of the moiety might be a discharge of the whole.<sup>(r)</sup> So, again, a prohibition was prayed to stay a suit for tithes of fish taken in

satisfy their tithes by fish; but that all and every such parish and parishes shall hereafter pay their tithes according to the laudable customs, as they have heretofore of ancient time within these fifty years been used and accustomed, and shall pay their offerings as is aforesaid. See Bunb. 239. 256, *Gwasas v. Kelynack*. S. C. Gwill. 691.

(l) Noy. 108.

(m) 1 Ro. Ab. 636, Long v. Dircell.

(n) Cro. Car. 264, Anon. See Litt. Rep. 147.

(o) Palm. 527.

(p) 1 Ro. Ab. 636, pl. 6, *Gould v. Arthur*. Id. 656, citing Co. Magna Charta, 621.

(q) 1 Ro. Ab. 642 pl. in *Goslin v. Harden*.

(r) Noy. 108, *Holland v. Heale*. See also 2 Wood, 35, *Swatman v. Bonner*; a custom to pay 5s. for each poat in lieu of tithe of all fish caught therein, allowed. 2 Wood, 154, *Thompson v. Field*. A custom for the rector of Scarborough to have the twentieth part of the fish, or of the value of such fish as are taken by any fishermen inhabiting the town of Scarborough, wheresoever caught, allowed.

the sea, and of corn, and the question was, whether twenty fish might be considered a good payment in satisfaction of all, and so twelve sheaves in respect of the corn; and the Court were of opinion, that the custom, as to the fish, was valid, because the payment would not be due without usage; but as to the corn, they said, that the twelfth part might be due of common right, and that a custom to pay nothing would not be good without more. The prohibition was, however, granted nisi.<sup>(s)</sup> Cause was afterwards shewn against the rule, on the ground that tithes were due of common right in respect of corn, and the Court being of the same opinion, discharged it.<sup>(t)</sup> But if the owner of a vessel lend it for the purpose of catching fish at sea, upon condition of receiving a certain quantity of fish on the return of the mariners, no tithes are payable by the mariners to the parson, out of the fish which the owner takes for the use of his ship because this is a personal tithe, to be reckoned upon the clear gain only; and so it is in Devonshire upon the hire of a ship or boat to take pilchards or herrings.<sup>(u)</sup>

The Earl of Scarborough preferred a bill in the Exchequer for the tithes of fish due by custom, and it was laid for all fish taken at sea, and brought to land and sold within the parish of H., of which the plaintiff was the impropriate rector; secondly, for all fish sold at sea, when the vessel came back to the parish; and thirdly, for fish taken by the inhabitants, and sold at another port. An issue was directed to try whether there was any, and what custom, although the plaintiff did not prove his custom as laid in the bill, and the Court (three Barons against the Chief Baron), said, that as this was a personal tithe, a double tithe might be payable, not only in the port where the fish was sold, but also in that where the fisherman dwelt, and \*that it was good custom for one tithe to be payable by custom, and another of common right.<sup>(v)</sup> [\*341]

According to another report of this case, the plaintiff's claim was for tithes of fish, at the rate of twelvepence in the pound, or the twentieth part, charges deducted; and it was ultimately arranged, that the plaintiff should have twelvepence in the pound, clear gain, after all charges were deducted.<sup>(w)</sup> And there may also be a custom to set out these tithes in kind. As where the impropriator of St. Ives claimed a tenth part of all fish caught at sea and brought into St. Ives for sale, and stated a custom for the fishermen to give notice to the rector, or impropriator, after the arrival of the fishing boats in the town, parish, or rectory, where the fish were to be unshipped and laid on land; and further, that the custom was after such notice given, for the fishermen to set forth on the shore the full tenth of the said fish.<sup>(x)</sup>

The same law has obtained with regard to tithes of fish in public rivers.

(s) 1 Lev. 179, Sheppard v. Penrose. S. C. 1 Sid. 278.

(t) S. C. 2 Keb. 2. 73.

(u) 1 Ro. Ab. 656, Goslin v. Harden. S. C. but differently reported. 1 Ro. Rep. 419.

(v) Bunb. 43, The Earl of Scarborough v. Hunter.

(w) S. C. 2 Gwill, 621.

(x) 1 Wood, 526, Lord Stamford v. Luke.

Thus a prohibition was applied for against a parson for suing for a tithe of trouts taken in a river, on the ground of their being *feræ naturæ*, and a precedent of Easter term, 5 Car. 1, was shewn, where a prohibition had been granted against the same parson for tithes of eels taken in the river. Jones, J., said upon this, that in Wales they used to pay tithes for herrings, and that in Ireland it was a common course to pay tithes of salmons taken in rivers. However, Richardson, C. J., observed, that, peradventure that might be by custom, but that otherwise no tithe was payable for fish taken in rivers.(y) It appears, from another report, that a prohibition was granted in the case.(z) And again, it was subsequently laid down as the law, that fish in a river are not titheable, unless by custom.(a) So again, it was said: A warren may pay tithes by custom; so doves in a dove-house, *or fish in a river*.(b) It was again resolved, that no tithes were payable *de jure*, without a custom, for fish taken in a common river not inclosed, *as in a stew inclosed*.(c) because they are *feræ naturæ*. And this, although they were taken by one who had a several [\*842] fishery there, and though the place where they \*were taken was within the parish of a person claiming them; for it is a personal tithe, in which case tithes ought to be paid, deducting expenses. A prohibition was granted in this case, which was for the tithes of salmons in the river of Eke, and so was another upon the same matter between the same parties.(d)

Notwithstanding the observation in the last case cited, it seems that fish in private waters are not titheable, unless by custom;(e) and, moreover, that if no profit be made of them by sale, a custom to demand tithes for them would not be valid. Thus the Court declared, in a case where tithes were demanded for various articles, and for fish in a pond amongst the rest, that such property was not titheable without a custom.(f) So again, it was determined, that fish in a pond, caught and sold are not titheable *sans custome*.(g) And in this sense, it is, that the passage in Rolle's Abridgment must be understood, where it is said, that fish in a pond, or in an inclosed river, are liable.(h) If, however, the fish be kept for the owner's pleasure, or home consumption, it had been asserted, that they would probably, be free from tithe, even although there were a custom to take tithe for them, or, in other words, that a custom to that effect would be invalid.(i) This law has been recognised with respect to pigeons and acorns,(k) and upon one occasion the Court said incidentally, that no

(y) Cro. Car. 339, *Dawes v. Huddleston*. S. P. Hett. 13. (z) 1 Ro. Ab. 635.

(a) Mar. 17, pl. 41, Anon. 6 Mod. 223.

(b) 1 Ventr. 5, Anon.

(c) We shall shew presently, that fish in a stew are not titheable, except by custom.

(d) 1 Ro. Ab. 635, *Gould v. Arthur*; *Wislake v. Arthur*.

(e) It is said by Sir Samuel Toller, that the concluding proposition in *Bunbury*, namely, that one tithe may be paid by custom, of fish, and one of common right, seems contrary to all the authorities. On Tithes, p. 49, note.

(f) 2 Gwill. 616, *Austen v. Nicholas*.

(g) Id. 1581, *Nicholas v. Elliott*. S. C. 1 Wood, 523.

(h) 1 Ro. Ab. 636.

(i) Toller, p. 50.

(k) See Litt. 40. 1 Gwill. 429.



tithes were due from fish *of right*,<sup>(l)</sup> but how far an express custom might operate to induce the Court to permit a tithe in such a case, will, as Sir Samuel Toller observes, continue to be seen.<sup>(m)</sup>

Lastly, with regard to the place where these tithes are to be paid. It is the opinion of Sir Simon Degge, that "if the parishioner of one parish land his fish in another, the tithes are divided between the parson of the parish where the fisher lives, and the other where he landed his fish; but if the parishioner land his fish in the parish where he himself dwells, then the rector of that parish has the whole tithes."<sup>(n)</sup>

\*The plaintiff, by his bill, demanded a tenth part of the clear gains and earnings of his parishioners; he claimed by immemorial custom, or otherwise, and proved his right to a twelfth part. The defendant insisted upon a right to tithes in kind of all fish caught at sea, and landed in his parish by nets, boats, and craft, housed and kept in the parish, in the interval of the fishing seasons; but he admitted that he had taken a composition. The question was between the ministers of two parishes, whether, where the inhabitants of one were hired by the inhabitants of the other, to work in the fishery, and were to be paid partly in money, and were also to have a share of the fish caught, the defendant was entitled to a tithe in kind of such share of fish. The fish when caught were brought into the defendant's parish. The plaintiff was rector of the parish, from whence the inhabitants were hired. The Court were of opinion, that, whatever was paid or rendered by the inhabitants of the plaintiff's parish, in satisfaction of the tithes of their occupation, should be paid to the parson of their own parish, and not to the vicar of the other, for otherwise they would be liable to a double tithe, or payment, for their share of fish. The vicar was undoubtedly entitled to tithes of fish caught, or taken by the nets, boats, and inhabitants of his own parish, or some composition for them. But his claim of any benefit of personal labour from the inhabitants of the other parish could have no reasonable commencement. The Court thought, however, that an issue should be directed to try whether the custom for tithe of fish in the vicar's parish, extended to the share of fish which the inhabitants of the other were to have for their work and labour with the nets and boats as before mentioned.<sup>(o)</sup>

Sir Samuel Toller adds, that whatever may be the complicated questions and circumstantial claims on this subject, between incumbents and impropiators of neighbouring parishes, unless the custom be explicitly clear, the presumption would appear to be in favour of the parish where the fisherman dwells.<sup>(p)</sup>

It is desirable to add, that in a bill for the tithe of fish, all the per-

(l) Het. 14<sup>th</sup>.

(m) Toller, p. 50.

(n) Parson's Counsellor, pt. ii. c. 13, p. 267.

(o) 2 Gwill. 931, Williams v. Baron. S. C. 1 Ro. Ab. 642. 656, Goslin v. Harden.

(p) Toller, p. 59.

sons interested in the adventure should be included. Therefore, when the proprietors of certain fishing boats, the owners of nets, and the master and crews of the boats, embarked together in an adventure of this kind, and the proceeds were to be divided amongst them according to agreement, but the bill was brought against the proprietors of the boats [\*844] only, it was dismissed. It was not contended, that all the persons engaged in the fishery should have been joined, but the plaintiff should have included all those who had been engaged in any one adventure.(q) Further, as we have seen, that an issue will sometimes be directed, although the plaintiff do not fully substantiate his custom; so also there may be an issue, notwithstanding that the defendant give no evidence against the custom, and even although there have been a former decree, which has been acquiesced in for many years. Upon such an occasion, the plaintiff shewed, that, a year after this decree, one hundred and thirty of the then defendants acknowledged the custom by an indorsement upon the decree. The Court were disposed upon this, to give judgment for the plaintiff, the defendants not having given any evidence against the custom; but upon the importunity of the defendant's counsel they granted an issue. The authority of the decree, together with forty-one years' acquiescence, were then found two strong to be got over, although there was some strong evidence on the part of the defendants, and a verdict passed in favour of the custom. The cause afterwards went up to the House of Lords, where the decree of the Court below in favour of the custom was affirmed.(r)

Mills are expressly included in the Commutation Act,(s) but, notwithstanding, it has been deemed advisable to insert the cases mentioned in the first impression of this Work. For, perhaps, commutation may not as yet be universally completed, and hence, the first pages which have been devoted to the subject, may still be found useful by way of reference.

With respect to the nature of the tithe, notwithstanding that there are several authorities upon the subject, the substance of them seems to have been expressed by Lord Chief Baron Macdonald, in a case concerning the tithes of a water mill. He said, that the tithe of mills is now settled to be a predial tithe, so far as it regards its locality, and the person to whom it is payable; but that the mode of payment it is to be treated as [\*845] a predial \*tithe.(t) A personal tithe is payable after the deduction of expenses; a *predial tithe*, being due of common right, is payable in kind.

(q) Forrest, 7, Coppard v. Page. S. C. Gwil. 1623.

(r) Gwavas v. Kelynack and others, Bunb. 239. 256. S. C. Gwil. 691. See 1 Wood, 203, Gwavas v. Teage, the case of the old decree. 2 Wood, 50, Wolrige v. Henna; and see also 3 Wood, 449, Boitase v. Batten, where a custom was established that tithes in kind should be paid to the vicar for all sea fish taken by any nets, &c., housed or wintered within the parish in the interval between the last preceding fishing season, and the season of catching the fish liable to pay tithe, whether the nets were the property of parishioners or not.

(s) 6 & 7 W. 4, c. 71, s. 90.

(t) 3 Anstr. 917. 3 Gwil. 1461.

It is desirable to attend to this distinction, because in the early cases there appears to have existed some doubt, whether this tithe were personal or predial. Thus Lord Coke says, that this is a personal tithe, coming from the gain of the miller, by his industry and labour; as a fisherman pays the tithe of his gain by fishing.(u) So again, Coke, Ch. J., declared, that this was a personal impost, and not payable unless by custom; and consequently a prohibition was granted in the case alluded to, a *modus* having been suggested.(v) So again, Mr. Justice Doderidge observed, two years afterwards, that of such things whereof the gain comes *only* by labour of men, tithes are not payable, but of things renovant, &c.(w) Tithe for malt mills also was said to be only personal, being profit solely arising from the invention of a machine, and the labour of man and horse, and so not a natural increase; and the tithes would therefore be of the neat profit, deducting all charges.(x) This tithe was, further, considered to be personal by a great decision which took place in the House of Lords. A horse mill for the grinding of malt was erected by the Corporation of the Borough of Tiverton. The plaintiff, the rector of certain portions of the parish church of Tiverton, preferred his bill in the Exchequer for tithes in respect of it. The decree was, that the tithe was the tenth toll-dish, and that the defendants should also pay costs. From this judgment the defendants appealed to the House of Lords, and there, eight Judges being present, the decree was reversed, and it was ordered, that the plaintiff below (the respondent) should recover his tithes of the mill in the nature of a *personal* tithe only; that is to say, the tenth part of the clear profits arising from corn ground in the said mills, over and above all incident charges. The Court of Exchequer were further directed to take an account accordingly, and it was ordained, that tithes should thereafter continue to be paid as above.(y) Upon the authority of this case, we are informed, that the Master of the Rolls ordered tithes to be paid *as personal tithes*, [\*346] in a case of mills before him.(z) Then, again the defendant had libelled in the spiritual Court for the tithe of a corn mill as *predial tithe*. The plaintiff set forth his answer, that he conceived the tithe of a corn mill to be a personal tithe, and therefore prayed to be allowed all his necessary charges in attending the mill, before he should pay the tithe. The Judge of the spiritual Court having overruled the plea, the plaintiff prayed a prohibition, and upon the authority of *Chamberlain v. Clifton*, above cited, a rule to show cause was granted.(a) And so, again, there

[ (u) 2 Inst. 621.

(v) 1 Ro. Rep. 405, *Jake's case*. S. C. 3 Bulst. 212. But Lord Coke must be taken to have spoken of very ancient mills.

(w) Cro. Jac. 524. See *Bunb. 73*, *Dodson v. Oliver*, where the Court were divided upon the subject. Id. 184.

(z) 9 Vin. Ab. 40, in the note, *Chamberlayn v. Plympton*. S. P. *Chamberlain v. Clinton*, cited Id. 39, in the notes.

(y) Id. *Chamberlain and others v. Newte*. S. C. 1 Eq. Ca. Ab. 336. S. C. 7 Bro. P. C. 3.

(x) 9 Vin. Ab. 40, in the note, *Charleton v. Brightwell*. S. C. 2 P. Wms. 462. S. C. 2 Gwill. 676.

(a) 2 Barnard. K. B. 336, *Donalt v. Lowther*.

was a suit in the spiritual Court for the tithes of a grist mill, and the libel charged, that the plaintiff had ground three hundred quarters of wheat, the tithes of which were worth certain sums mentioned in the libel, and the Court held, that the demand was to be taken as a demand of predial tithes, which were not demandable for a mill, and therefore a prohibition was granted, the tithes in question being personal.(b)

Then, on the other hand, there were authorities by which it appears that the Court considered this a predial tithe. Thus, in prohibition, there was one mill for corn, for which a *modus* was paid, and the party added two new mill stones. The parson sued for tithes. And Ch. J. Holt said, that this was a predial tithe, because it was payable to the rector of the place where the mill is, and not to the parson of the parish where the party lived.(c) At length it came to be understood, that the tithes of mills partook of a nature both predial and personal. For the Court was divided in a question concerning an ancient corn mill, that the tithe of a mill was in the nature of a personal tithe, and that as the right to personal tithes was grounded on the benefit the parishioners received from hearing divine service, the tithes of a mill were payable to the vicar of the parish in which the parishioners dwelt, though the mill was situate in another parish.(d) This is not now law, because the tithe is payable to the parson of the parish where the *mill is*; but it serves to shew, that the double nature of the tithe had been considered and allowed. And in a case where an account of the tithe of a water corn mill was prayed for, it was urged, that this was a predial tithe, and cases were cited, where it had been determined, that if a mill were built upon land discharged from [\*847] tithes by a *modus*, it should not pay tithe, but should participate in the \*privileges of the land where it was built.(e) And, although Mr. Baron Eyre seemed at first to doubt the authority of those cases as proceeding upon a mistaken notion that the tithe was predial, he subsequently delivered an opinion recognising the joint character of the tithe, but yet in no way recognising the authority of the decisions. Though it was to be recovered in the nature of a personal tithe, his Lordship said it ought not to be taken strictly as a personal tithe; but it must be deemed so far predial, and having so much reference to the place where it might arise, as occasionally (and which was the case before the Court) to fall within the description of a small tithe, in respect of an old inclosure. The bill was then dismissed, though without costs, it being a new and doubtful question.(f)

The case came under great consideration in a few years afterwards. One of the defendants had built a new water mill, and he lived in a

(b) 2 Gwill. 287, *Cooke v. Derby*. See also *Id.* 871, *Thomas v. Price*.

(c) 1 Show. 281, *Gumley v. Falkingham*. See also *Hall v. Machet*, p. 347.

(d) 3 Wood, 385. Gwill. 974, *Wilson v. Mason*.

(e) *Russell v. Moore*, 1 Ro. Ab. 651. *Id.* 652, pl. 4. These cases do not seem to be law at present, now that the distinction as to personal and predial tithe has been established.

(f) 3 Gwill. 1256, *Gaches v. Haynes*.

neighbouring parish. It was insisted on his behalf, that this was a personal tithe, and so due to the rector of the parish in which he resided. It was further contended, that the charges of building the mill were to be deducted, and that as they had not yet been repaid, no tithe could be due to either rector. As to the question to whom this tithe was due, it was insisted for the plaintiff, that this was a predial tithe payable rectori loci where the mill was, that it could not be a personal title in respect of locality inasmuch as it had been decided, that a modus for land would cover a mill erected thereon. As to the deductions, no other except the annual deductions could be claimed as such. The Chief Baron, after adverting to the mixed nature of this tithe, considered it as settled, that the payment of tithe should be made to the rector of the parish where the mill was. With regard to the deductions, the Court thought it would be hard on the incumbent, if the whole expenses of building the mill were to be deducted in the first instance; his chance of being ever benefited by it would in such a case be probably destroyed. But until some retribution should be made for the original expense, the miller ought not to be charged. If, as in *Chamberlayne v. Newte*, the mill had been in the hands of a tenant, there would not have been any difficulty, because the clear gain would be that which might remain to the tenant after the payment of his rent and other expenses. But the same measure of justice could be applied, as though the property were out on lease. An annual value or rent might be set upon it; and when ascertained, it might be deducted, as though rent were \*actually paid. The counsel for the plaintiff then suggested, that the [\*348] valuation should be made upon the machinery only, for in many places the principal part of the rent arose from the value of the fall of water, and that being the natural benefit arising from the freehold, would be most properly the subject of tithes; and thus, the deduction ought only to be proportioned to the recompense for erecting the machinery. But the Court intimated their resolution to lay down a general rule, and they directed the deputy remembrancer to set an annual value or rent upon the mill, then to deduct the whole rent and other incidental expenses of servants, &c.; after which, the defendant, the owner of the mill, should account for the tithe of the clear profits.(g)

The result, therefore, of these authorities is, that the tithe must be considered as personal with reference to the individual who is to pay it; but as it regards the parson who is to receive it, the tithe is predial, that is to say, it must be paid to the incumbent of the parish where the mill is situate.

Our next question is, to inquire as to the kind of mills which are liable to this payment. It seems to be agreed, that before the statute *Articuli Cleri*,(h) tithe was due in respect of some mills, although not of common right;(i) and after the law, it was understood that none except-

(g) 3 Anstr. 915, *Hall v. Machet*. S. C. 3 Gwill. 1460.

(h) 9 Ed. 2, c. 5.

(i) 12 Mod. 243, per Holt, C. J.

ing such ancient mills as had never paid tithes were exempted. Thus, a prohibition was awarded to the Bishop of St. Asaph, on the ground that tithes were not payable in respect of ancient mills.<sup>(k)</sup> And this means, of such mills only as existed before 9 Ed. 2, that is, of very ancient mills; for after that even though they be before memory of our ancestors they may be liable to the charge.<sup>(l)</sup>

A mill, therefore, erected since the statute referred to, according to the better opinion, is titheable in pursuance of the express provisions of the act. Although a man may prescribe generally concerning a mill in non decimando,<sup>(m)</sup> leaving it to the rector to shew that tithe has been at some time or other received in respect of it.

[\*349] Some observations are necessary here to explain that which we mean by the better opinion. The words of the statute of Edward II. are, that if any do erect on this ground a mill of new, and after that the parson of the same place demandeth tithe for the same, the King's prohibition doth issue, &c. But it was answered, that in such case the King's prohibition was never granted by the King's assent, nor ever shall, which hath decreed, that it shall not hereafter lie in such cases. To this succeeded the act of Edward VI., and it was thereby enacted, that every person exercising merchandize, bargaining and selling, clothing, handicraft, or other faculty, being such kind of persons, and in such places, as heretofore within these forty years have accustomed to pay such personal tithes, or of right ought to pay (other than such as be common day labourers), shall yearly, at or before the feast of Easter, pay for his personal tithes the tenth part of his clear gains, his charges, and expenses, according to his estate, condition, or degree, to be therein abated, allowed, and deducted.<sup>(n)</sup> Upon this, the two Chief Justices, Holt and Trevor, held in the case of *Newton v. Chamberlain* above referred to, that no tithe at all was payable in respect of the mill in question, because such tithe would be due only where it had been paid for forty years before. The other Judges (Powel, J., excepted) held, that the tithe was personal. However the cases agree that *new* mills<sup>(o)</sup> are titheable by virtue of the statute; and Sir Samuel Toller observes, that this latter act may well control, by its special and particular enactment, the statute of Edward VI., which is general.<sup>(p)</sup>

Yet it should be added, that the statute of *Articuli Cleri*, is considered not to apply to other than corn mills, as we shall see by and by.

Before we proceed to mention the cases on this part of the subject, it may not be amiss to state, that the following decision cannot be consi-

(k) *Pain v. Evans*, cited in the note by Dy. 170, (b) pl. 5.

(l) *Ib. Tanner v. Kirkham*, cited Co. Entries, 463. S. P. Dy. 170 (b), *Sconies' case*. S. P. Mar. 15. S. P. 1 Wood, 352, *Ansell v. Adman*. S. P. *Hicks v. Triese*, 3 Wood, 363.

(m) Comb. 404, *Holt, C. J.*

(o) 9 Vin. Ab. 40.

(n) 2 & 3 E. 6, c. 13, s. 7.

(p) On Tithes, p. 45.

dered as law,<sup>(g)</sup> on the ground that a partiucular custom cannot counter-vail an act of the Legislature. A custom was alleged, that if any baker of bread should erect any water or other mill within certain hundreds, no tithes were payable according to an established usage; and it was said, that the hundreds might prescribe in non decimando. And a prohibition was granted, where the baker had erected a mill in one of those, being himself an inhabitant of the other.<sup>(r)</sup> But Holt, C. J. said, that this case was inconsistent with the statute Articuli \*Cleri.<sup>(s)</sup> [\*350] However, the Court will presume, in the absense of any proof to the contrary, that the mills are ancient; and it was held in a case of corn mills, no proof having been made of the payment of tithes at any time.<sup>(t)</sup>

In speaking of new mills as subject to tithe, such mills are intended, as have been erected where there were not any before, there being a wide difference between such, and mills rebuilt upon an ancient site, in regard to tithability. For it was very early holden, that if an ancient mill fall, and be then rebuilt upon the old foundation, the discharge of tithe should hold good and revive.<sup>(u)</sup> Where, therefore, a prohibition was prayed, upon a suggestion, that the parson had libelled for tithes of a mill erected upon land which was discharged of tithes by the Statute of Monasteries, the Court denied the prayer, for the mill being lately erected, tithes ought to be paid for it, and no discharge of the glebe could extend to a mill erected de nova.<sup>(v)</sup> So, again, it was said in another case, by Coke, that a modus could not go to a new mill; for an ancient mill the modus might be allowed, but the custom could not be extended farther. A consultation was therefore awarded.<sup>(w)(x)</sup> So, also, it was resolved in another case, that tithes were payable in regard of new mills, and that the tithes should be the tenth toll-dish<sup>(y)</sup>

Some questions have arisen upon the alteration of ancient mills, whether they become in such case liable to tithe. We have just mentioned one decision, where it was resolved, that the rebuilding of a mill upon the same site would destroy the ancient exemption. And it has been determined, moreover, that the change of an ancient stream which occasions a removal of the mill, should not operate to charge the miller, upon the principle that the act of God injures no one. Thus, there were two an-

(g) It was held bad by Holt, C. J. Comb. 404.

(r) 1 Ro. Ab. 654, Kidden v. Edwards.

(s) Comb. 404. (t) 2 Gwill. 645, Hughes v. Billinghurst.

(u) Pain v. Evans, cited Dy. 170, pl. 5, note.

(v) Anon. Cro. Jac. 429. S. C. 1 Gwill. 286.

(w) 3 Bulst. 212, Jakes, plaintiff, J. S. defendant. See also 9 Vin. Ab. 39, Chamberlain v. Newte.

(z) Yet it is said, Co. Magna Charta, 490.—If a man be seised of eight acres of pasture, and of meadow, for the tithes of which there have been paid, time out of memory, &c. 5s. 6d. and after the owner thereof erects thereupon a corn mill, he shall pay no tithe for the corn mill, because the land was discharged per modum decimandi.

(y) 1 Eagle and Young, 661, Ross v. Windsor. The case is not law as far as it respects the tenth toll-dish, because it is a personal tithe. See post.

cient mills from time immemorial, and there was an ancient *modus* in respect of them. The mill stream at length altered its course, and ran [\*351] into a place at some distance, upon \*which the owner of the ancient mills pulled down one of them, and rebuilt it on the spot where the new stream ran, and the question was, whether this new erection should have the privileges of the original exemption. The Court held, that it should, and a prohibition was granted.<sup>(z)</sup> But they added an opinion, which is extremely worthy of observation, because it affords us an explanation of a subsequent case, where the mill was held to be titheable, and to which we shall advert presently. It was this: that if the ancient watercourse were changed by the act of the party himself, the owner of the mill, the ancient *modus* shall not operate as a discharge.<sup>(a)</sup>

The next case, it must be admitted, seems to militate against the doctrine above laid down; but in reviewing it, it should be observed, that it proceeded on the ground that a mill partook more of the *personalty* than the *predialty*, and, consequently, that the person who built a new erection was additionally chargeable. And when it is recollected, that there was once a great doubt and confusion respecting the personal and predial nature of tithes, and that, at present, although they are certainly compounded of both natures, yet that they are *payable to the parson where the mill is*, the case about to be given will probably be deemed of less weight than those to which it is certainly opposed. There are two ancient messuages, and two ancient water grain mills, and for these a *modus* had been immemorially paid to the parson, and then the owner erected two new grain mills within the messuages. The Court inclined, that this *modus* did not extend to the new mills, for that the tithes of a mill are not merely predial, but mixed with the *personalty*, and savour more of the personal than the predial character. The plaintiff in prohibition was nonsuited at *nisi prius*, issue having been taken upon the *modus*, and (the point above having been raised upon demurrer,) he was nonsuited as to that also, and a consultation was awarded. Nevertheless, the Court expressed a disposition to hold that the *modus* should not extend to the new mills.<sup>(b)</sup> Then followed a decision, which at first sight might seem to agree with the last; but as, in effect, it will be found to have proceeded from an impression on the mind of the Court, that the defendant had diverted a current of water, near which he built a new mill, for his own private purposes, the rule laid \*down in *Johnson v. Dunridge* will exactly [\*352] apply, and as *Goodwin v. Smith* was not actually decided, the cases will be consistent.

The plaintiff was vicar of Cadoxton, near Neath. There was a custom

(z) 1 Ro. Ab. 641, R. pl. 1, *Johnson v. Dunridge*. S. C. 1 Ro. Ab. 652, F. pl. 2.

(a) Ibid.

(b) *Goodwin v. Smith*, 1 Ro. Ab. 652, pl. 3. See also *Ross v. Windsor*, 1 Eagle and Young, 661, where a mill rebuilt upon another spot was held titheable. But the case was cited from the MSS. of Lord C. B. Dod. does not seem to be very distinct, for it does not appear under what circumstances the mill was removed, which might make all the difference.



that he should have the tithe of mills within the parish. The defendants occupied certain water grist mills in the parish. The bill, after stating these facts, went on to allege, that the defendants pretended to an exemption from tithes by reason of an ancient mill, which through length of time had decayed, and had been taken down, and in whose place new mills had been erected. But the plaintiff insisted, that the mills for which he demanded tithes had been erected on a part of the parish where an ancient mill had never stood, being erected on a new channel or current of water which had been diverted from its ancient course, *into a new cut, made for some private purposes* of the owner of the soil on which the same had been rebuilt. The bill then prayed a discovery of the quantities of corn and malt ground on the premises; the value of the toll or mulcture; and a just and fair account of the value of the tithes. The defendants, after several admissions, answered, that the mill mentioned was an ancient mill, immemorially free from tithes, that it had been pulled down, and that another had been built upon the stream of the brook with some part of the old materials, and on lands which also have been immemorially exempt from tithe. The defendants added, that if the mills were liable to the payment of tithe, it was a personal tithe, and that the expense of building ought to be cleared, before the charge ought to accrue. The defendants, also, insisted on their not being inhabitants of the parish, and that their tithe was due, if any where, to the rector of the parish where they resided. The Court said, that the plaintiff was entitled to the tithe of the toll of the newly erected mill, as a personal tithe only, namely, the tenth part of the *clear profits*; and they made a decree accordingly.<sup>(c)</sup> It seems clear, that the Court entertained an idea that this alteration of the mill and stream had been accomplished for the private advantage of the owners, and, if so, the case clearly falls within the exception above alluded to, and, consequently, is not by any means subversive of the old law. It may be added, that it is not otherwise than a reasonable doctrine, for a party, whose ancient mill is in decay, to be allowed the immemorial exemption attached to it, if he should re-edify it. This law is, that estovers may be spent upon a new chimney in an ancient house,<sup>(d)</sup> that ancient lights may be enjoyed as before, notwithstanding the rebuilding of a dwelling; and there does not seem to be any just reason, why an ancient mill should lose the benefit of a modus, because it becomes necessary to make a new one upon its site. [\*353]

So again in another case, where the new mill was partly built on the old, and partly on the new site, the Vice Chancellor gave judgment in favour of the vicar. But it was admitted that an ancient mill which had never paid tithes should continue free, and likewise a new mill built entirely on the old site.<sup>(e)</sup>

This position has been ratified by authorities; and it is submitted, that

(c) 2 Gwill. 871, Thomas v. Price.

(d) 2 Leon. 45. Godb. 97.

(e) 5 Sim. 243, Newcome v. Matthew.

hitherto there have been scarcely any irreconcilable decisions on the subject of tithing mills.

We have therefore ascertained that these tithes are predial, as they respect the person to whom they are to be paid, and so far are connected with the land; and thus it is that the alteration of a mill is regarded with so much strictness. We have proved, that if the mill be taken down, and another built on the same site, no tithe will be payable, if the land have been before exempt, or discharged by a *modus*; or if, in consequence of a change in the course of the stream, it becomes necessary to alter the position of the mill, still no tithe is due, under such circumstances. But if a mill be taken down and built elsewhere, to suit the private convenience of the owner, a tithe will arise. It is difficult to conceive any other principle upon which a mill would be removed, otherwise than for private convenience, except on account of the alteration of the current of water.

We have hitherto treated of the entire abolition or renovation of the whole mill; the next point will be to consider how far an alteration in the nature of the mill will affect its liability to tithes. And it may be observed, as a general principle, that such an alteration will subject the mill to payment, or to a new mode of accounting for the profits. The authorities on the subject are, however, contradictory. As, for instance, there was a mill for corn, for which a *modus* was paid. The party added two new mill stones. The parson then sued for tithes. It was urged, that the tithe was only personal, and that there ought not to be a double tithe, which would be the case if these mills were charged. But by Holt, C. J., the tenth toll-dish is the tithe; it is not the owner of the mill, nor the owner of the grain, who has the profit, but the miller; it is a predial tithe, being payable to the rector of the place where the mill is, and not merely where the party lives.<sup>(f)</sup> It appears, however, that a prohibition was subsequently granted; but the difficulty \*which the Court felt was [\*354] as to the personalty or predialty of the tithes,<sup>(g)</sup> a question which, as we have seen, is now settled. Other decisions are contrary to this resolution. Thus, it was resolved that a *modus* for a water mill was not destroyed by the addition of another pair of stones under the same roof.<sup>(h)</sup> A bill was brought for tithes, and a plea of a *modus* of 6s. 8d. was offered, when the mill was partly a corn, and partly a fulling mill. The fulling wheels were taken away, upon one occasion, and a pair of mill stones put in their room; and since that time, the mill continue<sup>d</sup> to be a corn mill. It was argued, that the *modus* could not extend to cover a newly erected mill; for, being altered to a corn mill, it ought to pay tithes in kind. The Lord Chancellor said, that the reason why a *modus* was destroyed, where two stones were erected in the room of one,

(f) 1 Show. 281, *Gumley v. Falkingham*.

(g) Carth. 215, *Gumble v. Falkingham*. S. C. where the Court are reported to have said, that the *modus* was not destroyed by the new pair of stones S. C. 4 Mod. 45, nom. *Grimley v. Fawlingham*.

(h) 1 Ro. Ab. 652.

was *because the miller can grind a double quantity*. There were formerly two fulling mills and a corn mill under the same roof; the fulling mills are now turned into two new corn mills; it was the same thing as though the defendant had erected two new mills. It became necessary to shew so much, that there was a custom in the parish for fulling mills to pay tithes, otherwise they did not properly pay them. The Lord Chancellor added, that the only colourable thing was, that there was an ancient *modus* for the land, and that the mill was but an accidental quality. But being pleaded as a conjunct *modus* for both land and mill, the plea must be overruled.<sup>(i)</sup> Upon the authority of this case, the Master of the Rolls (Sir Wm. Grant) decided a suit, in which it appeared that an ancient corn mill had been rebuilt, and *two pair of new stones added*. An account was decreed as to the two pair of new stones, and the Judge took occasion to observe, that the cases upon the subject were not easily reconciled.<sup>(k)</sup> A fortiori, if two fulling mills be under one roof, and a rate tithe be paid for the mills, and then an alteration be made, one of them being converted into a corn mill, the rate is gone, and tithes must be paid in kind. If, again, you have but one pair of stones in your mill, for which a rate is paid, and another pair is added, new tithes must be paid in kind.<sup>(l)</sup> But where a third pair of stones had been added to a mill which originally had two pair only, the whole being carried by the same frame and wheels which carried the former stones, and the mill not being able to work more than two pair at the same time, the Court established a *modus* which had been *alleged*, and directed the original bill to be dismissed with costs, both in law and equity.<sup>(m)</sup> [\*355]

With the exception of the case in *Carthew*, it then appears, that an alteration in the *power* of the mill, so as to occasion the grinding of a larger quantity of corn, will destroy a *modus*, and introduce a demand of personal tithes; that is to say, a charge of that description, all expenses being first deducted. Another kind of alteration has, nevertheless, been presented to the attention of the Court. A case came into the Exchequer, where an ancient water corn mill had been occasionally used as a lead mill. The plaintiff brought his bill, as vicar of Deptford, for the tithes of two mills, the one an ancient water mill, and the other a wind mill erected about thirty years. The water mill was shewn to have been a very ancient mill. The southern wheel of the mill was, however, used as a lead mill about forty-five years since; it was subsequently used again wholly as a corn mill. The defendant never lived in the parish of Deptford. It was urged, that by the change from a corn mill into a lead mill, the exemption was destroyed, and that it could not revive by re-converting it into a corn mill. But the Court were of opinion, that the mill being the substance and thing exempted, the using one of the wheels as a lead mill, for a time, would not put an end to the exemption. Had the ancient mill, indeed been wholly used as a lead mill, there would have

(i) 3 Atk. 17, Talbot v. May. S. C. 2 Gwill. 782.

(k) 3 Ves. & B. 71, Manby v. Taylor. 4 Gwill. 1720.

(l) 1 Brownl. 32.

(m) 2 Gwill. 715, Goodwin v. Wortley.

been a suspension, but not an extinguishment of the privilege.<sup>(n)</sup> If a greater profit had not been derived from the lead mill, this decision is not inconsistent with the preceding authorities.

There must be some derivable profit. Where the plaintiff claimed the tithes of two mills, and it appeared that one was an ancient mill, and that the other had been a *tacking* mill, but that the defendant had converted it into a corn mill, and had used it for the sole purpose of grinding oats for his hounds, the Court considered the latter mill was not titheable, inasmuch as it yielded no profit, and of course, held the ancient mill to be exempt.<sup>(o)</sup>

So if a party grinds his own corn at his own mill, he is not liable to tithes, although he sell the corn to the public. And thus it was determined in the case of a miller who ground his own flour for sale.<sup>(p)</sup> In [\*356] another case, the decree directed the \*defendant to account for the profits arising from the *corn ground for hire only*, and the Master to deduct the reasonable expenses of working the mill.<sup>(q)</sup>

It appears from the above decisions, that mills used for the grinding of corn and grain, by which a profit is gained, are subject to tithes; but it still remains open to our consideration, whether *all* mills are so liable. The better opinion seems to be, that fulling mills, copper mills, indeed, all mills which do not grind meal for food—are exempt from tithes, unless by special custom.<sup>(r)</sup> Thus, where tithes were demanded for a copper mill, a prohibition was granted, for that the gain arose from the labour and industry of man; and the same exemption was said to apply in favour of a fulling mill, shaving mill, glasshouse, &c.<sup>(s)</sup> A prohibition was prayed to stay a suit in the Spiritual Court, for the tithes of a fulling mill; and it was suggested, that the defendant fulled forty cloths every week, and that he gained two shillings by every cloth. The prohibition was granted upon a surmise, that by the law, tithes were not demandable in respect of such mills, for the gain comes only by the labour of men; and tithes, said Doderidge, J., are not payable except for things renovant, &c.<sup>(t)</sup>

So also it was said, that tynn mills, lead mills, or plate mills, or rag mills, should pay no tithe, and that the usage of the country should be respected in this matter.<sup>(u)</sup> However, the exemption of fulling mills was not agreed to, as it seems, without a struggle. For it is asserted, that two Judges<sup>(v)</sup> had been of opinion, in the 12th Jac., that a tenth penny of the gain should be paid in respect of a fulling mill, being in

(n) Id. 974, Wilson v. Mason. (o) Id. 1022, Hicks v. Triese.

(p) 3 Id. 974, Wilson v. Mason. S. P. 2 Sim. 305, Browne v. Wolsey. S. P. Id. 297, Townley v. Colegate.

(q) 1 Younge, 596, Austin v. Elphinstone.

(r) See Id. 979.

(s) Litt. Rep. 314.

(t) Cro. Jac. 523, Danderidge v. Johnson. S. C. semb. 2 Ro. Rep. 84. But it seems that the prohibition had been denied a few years before, in a suit between these parties. 1 Ro. Ab. 641, pl. 19.

(u) 2 Ro. Rep. 84.

(v) Warburton and Nichols.

the nature of a *predial* tithe; and so of a corn mill, the tenth dish of corn.<sup>(w)</sup> And a case is cited where that doctrine was actually held.<sup>(x)</sup> But Mr. Justice Doderidge subsequently observed, that if this were to be considered as a *predial* tithe, the person who sheared the cloth, and the dyer also, might be called on to contribute for tithes, in regard of the same cloth; and he added, that it must be personal tithe, because it accrued only by the labour of man.<sup>(y)</sup> In another report of the case, it appears \*that the learned Judge observed upon the inconvenience [\*357] which would ensue, if fulling mills were held titheable; because, in that case, paper mills, iron mills, and tin mills, might be charged, and he did not know in what manner tithes could be paid of fulling mills, since it would not be reasonable that they should be paid of the tenth cloth.<sup>(z)</sup> "The generality of this reason," says Sir Samuel Toller, speaking of the above exemption of fulling mills, by reason of the spring of their profits from manual labour, "would not only preclude the profits of any manufacturer from being titheable, but would also exempt fish."<sup>(a)</sup> The learned author, therefore, rather prefers to consider the nonliability of these mills as a *prima facie* exemption, but that they may, nevertheless, be subjected to tithe, by shewing a custom.<sup>(b)</sup>

And so, again, *Gibson*, in his Codex, lays it down, that corn mills only are within the act of Ed. II.; tithes being due for fulling, tin, and other mills, if at all, by custom.<sup>(c)</sup> Lord Coke had expressed his opinion doubtfully upon the subject; although, notwithstanding the perplexity which afterwards succeeded, he seemed to intimate, that if any tithe were payable, it would be a personal tithe. The authors whom he quotes held the words of the act of Ed. II. to be general, and to extend to all mills, public as well as private, fulling mills, paper mills, &c. And, said they, it ought to be of corn mills; for if the parson should have the tenth toll dish, then he would have not only tithe corn, but also tithe of the same corn, ground at the mill, and so a double tithe, which he ought not to have of a fulling mill, paper mill, &c.<sup>(d)</sup> And so, in another book Lord Coke observes, that the tithes of fulling mills and paper mills are personal tithes;<sup>(e)</sup> although he allows, in his Institute, that the cases of tithes had never been (within his knowledge) judicially determined.<sup>(f)</sup>

These tithes were payable yearly, before Easter;<sup>(g)</sup> indeed, Easter offerings have been said to be a compensation for personal tithes,<sup>(h)</sup> however inadequate the exchange may appear,<sup>(i)</sup> and therefore, it is that they are included in the commutation act of 6 & 7 Wm. 4, c. 71.

\*In suggesting grounds for a prohibition, it has been holden bad to say that it was an old mill, because, before the statute *Articuli Cleri*, some mills were chargeable, though some were not. And [\*358]

(w) Ibid. (x) *Ubi v. Lux*, cited Ibid. (y) Ibid. (z) 1 Gwill. 357.  
 (a) On Tithes, p. 47. (b) Id. 48. 3 Atk. 19. (c) Page 666.  
 (d) 2 Inst. 621. (e) Co. Magn. Ch. 621. (f) 2 Inst. 622.  
 (g) Id. 621. (h) Bunb. 174, by Lord C. B. Gilbert. (i) Toller, p. 48.

therefore, the more proper course is to prescribe *in non decimando*, and to bring an affidavit of the truth of the fact.(k) In that case, in the absence of any proof to the contrary, the Court as we have seen, will presume the antiquity of the mill.

It has been held, that the defendant, in his answer to a bill for tithes, must state the quantity of meal ground and sold at his mill, the plaintiff having a right to that information, as a check upon the miller; but the Court said, that the price of the meal need not be disclosed. It was so determined, upon a demurrer to the plaintiff's bill, and the demurrer was accordingly overruled, because it covered too much.(l)

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Settlements are acquired by the ownership or possession of some of the kinds of property mentioned in this work.

Thus, the renting of a fishing in a pond has been held to give a settlement. The pauper's father took, and held during two years, under a parol agreement, the fishery of the pond in Old Alresford, containing sixty acres, with the grates, &c., and also all the spearsedge, flags, and rushes, growing in and about the said pond; together with the right of cutting the sedge growing on a piece of rough meadow, or sedgy ground, which latter was distinct from the pond, and was held under a different right. The pauper's father agreed to pay 10*l.* a year for the premises, and to supply the landlord's house with fish. The same person held, at the same time, under a parol demise, the fishery in the causeway river in New Alresford, with the grates to a small fish house, for which he paid 3*l.* per annum. It did not however, appear from the case stated by the sessions, whether the fishery in question was a several, free, or common of piscary; and it was urged, that an incorporeal hereditament was not within the statute of William III. But the Court gave judgment in favour of the settlement, Lord Mansfield observing, that they would intend the fishery and soil to have passed together.(m) Here the Court laid great stress upon the occupying of *land*; but Mr. Justice Buller said, he was by no means prepared to allow, that if it had been any other kind of fishery, it would not have given a settlement.(n) Such a fishery, the learned Judge might \*have meant, as would be matter of [\*359] tenure. So where the pauper was entitled to the exclusive cutting of rushes from two ponds, although the owner reserved to himself the use of the water, he was held to have gained a settlement.(o) So where the pauper was allowed to take sand and gravel out of the bed of a river by a corporation, upon certain conditions, he was held to have gained his settlement.(p) A common in gross has been held a sufficient tenement for the purpose of acquiring a settlement, because it lies in

(k) 12 Mod. 243, *Hart v. Hall*.

(l) Wight. 15, *Chapman v. Pilcher*. S. C. 4 Gwil. 1653.

(m) 1 T. R. 358, *Rex v. Old Alresford Inhabitants*.

(n) Id. 367.

(o) 1 B. & C. 23, *R. v. All Saints, Cambridge*. S. C. 3 Dowl. & R. 47.

(p) 5 M. & S. 90, *R. v. All Saints, Derby*.

tenure, and a *præcipe quod reddat* might have been brought for it.<sup>(q)</sup> Upon the same principle, therefore, a fishery not appendant nor appurtenant to any lands, nor annexed to the soil, might be deemed sufficient for the same purpose; such as a fishery granted by deed to the person of an individual, but not in any way connected with lands, and exclusively enjoyed, as it respects the owner of the soil. But a mere right to fish will not have that effect; and therefore, the privilege of a commoner entitled to piscary in the lord's river will not enure to give him a settlement.

It should however be added here, that, in estimating the value of a tenement, a thing moveable in its nature may be attached to it, as an accessory, for the purpose of enhancing the yearly worth of the tenements. Therefore in a case, where the Court held, that the renting a dairy (including the cows and their pasture) would not confer a settlement, unless the land, upon which the cows were depastured, was above the annual value of 10*l.*, Lawrence, J., took occasion to observe, that this was quite different from a warren or *fishery*, for the rabbits and the fish were the produce of the land, but this was merely a contract for the hire of cows.<sup>(r)</sup> Fish in a fishery, therefore may be said to augment the inheritance, so as to increase the estimated value of a tenement, in questions of settlement.<sup>(s)</sup>

The renting of a mill of the value of 10*l.* a year will certainly confer a settlement. This is, however, a general proposition subject to qualifications which we shall mention immediately. For it is necessary, that the mill which gives this privilege should be a tenement. Thus, upon a question concerning the renting of a water mill, the Court declared, that a mill was a tenement, and consequently that the renting of it would gain a settlement.<sup>(t)</sup> This having been determined concerning a \*water mill, a question was made as to a wind mill, but the Court [*\*360*] affirmed the settlement in respect of this mill also.<sup>(u)</sup>

Yet there need not be a residence on the premises, in order to come within the provisions of the statute Wm. III., provided there be a residence in the parish. It was urged as an argument against the settlement in one of the above cases concerning a wind mill, that water mills were always habitable, but wind mills often not. The Court, however, paid no regard to this objection, as the pauper lived in a cottage which he rented in the same parish.<sup>(v)</sup> Then again, where the pauper rented a wind mill of the value of ten guineas, and occupied it for one year, it was objected that he had not resided in any part of the parish where the

(q) *Rex v. Dersinham Inhabitants*, 7 T. R. 671.

(r) 2 East, 201, in *R. v. Minworth Inhabitants*.

(s) 1 Nolan, 36.

(t) 2 Salk. 536, between the Parishes of Evelin and Rentcomb.

(u) *Rex v. Butley Inhabitants*, 1 Str. 1077. S. C. Burr. Set. Ca. 107. S. C. Ca. Temb. Hard. 391. S. C. Andr. 3. See also 1 Str. 502, between the Parishes of Cranley and St. Mary, Guildford.

(v) *Rex v. Butley*, ut supra.

mill was; and this difficulty was considered insurmountable. But the Court intimated, that a residence in the parish, although not upon the premises, might have been sufficient.(w)

We proceed to show, that the occupation of some mills will not be productive of a settlement, and the reason is, because they cannot be considered as tenements. Thus, the pauper built a post wind mill, and worked it for some time. It was constructed upon cross traces, laid upon brick pillars, but not attached or affixed thereto, and it was considered to be removable at the tenant's (the pauper's) pleasure. The value of this mill, together with the land rented by the pauper, would be more than the annual sum of 10*l.*, but less if the worth of the mill should be deducted. The Court held, that no settlement had been acquired. They said there was no doubt but that the taking of a wind mill attached to the ground, and of 10*l.* annual value, would confer a settlement; a *præcipe* would lie for such a wind mill. But here the mill was nothing but a chattel, it was the property of the tenant himself, not fixed in the ground, but detached from it. It was no more a tenement than a large coffee mill put up by the tenant in his house.(x)

A fortiori, the mere renting of working or grinding places at a mill will be ineffectual for this purpose. Thus, with respect to the grinding at a corn mill, the pauper covenanted, under seal, with the owner of such a mill, that he would, with horses and carriages, at his own costs, deliver [\*361] at the mill three loads \*and a half of wheat, weekly, and grind the same into flour at his own costs, and pay the said owner eight shillings per load at times stated in the agreement. The counsel abandoned this case, and the Court said, there was no colour for construing this agreement into the taking of a tenement.(y) So, where a needle-maker rented two out of six pointing places in the mill of another, and agreed to do his landlord's work in preference to that of strangers, the Court said, that there was no pretence for calling this agreement to work in a mill the taking of a tenement, and *R. v. Hammersmith* was cited as expressly in point.(z) So where the pauper rented certain runners for scouring needles in the mill of another, and a settlement was claimed for him in respect of these, the Court asked, how the case could be distinguished in principle from that of *Rex v. Dodderhill*. The counsel in support of the settlement answered, that there the pointing places in the mill, which were equivalent to the runners, were not in the *exclusive* possession of the pauper; but the Court were quite clear against the settlement. In effect, this was not taking part of the mill as a tenant, but it was a license to use a particular part of the machinery of it for the purpose of manufacture, and for no other purpose..(a) Lastly, it was contended, that the renting of a standing place in a room for a

(w) 2 T. R. 48, *Rex v. Knighton Inhabitants*.

(x) 6 Id. 377, *Rex v. Londonthorpe Inhabitants*.

(y) 8 T. R. 450, n., *Rex v. Hammersmith Inhabitants*.

(z) 8 Id. 449, *Rex v. Dodderhill Inhabitants*.

(a) 1 East, 528, *Rex v. Tardebigg Inhabitants*.



carding machine belonging to the pauper, but in the mill of another person, gave a settlement. It was said, that the pointing places and runners were mere chattels, and no part of the mill; whereas here was no standing place in the mill, which was necessarily a taking of part of the mill itself. But the Court observed, that there was no solid distinction between this and the other cases; it was a mere liberty to go and stand for the purpose of working at the trade, a license to use the machinery of the mill, but not a letting of the mill itself.(b)

Certain fen lands were vested in trustees, but paupers on such lands were to be maintained by the trustees, and never to become chargeable to their respective parishes. The lands were not thereby made extra-parochial, and it was held that a settlement might be gained on such land in the parish where a hiring for a year took place, and a service for a year was performed.(c)

The writ of right of dower, or writ of dower unde nihil habet, is (amongst others) excepted out of the clause which abolished [\*362] \*real and mixed actions after the 31st of December, 1834.(d) And a plaint for freebench or dower is included in the like exception.

Tenant in dower is, where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and takes a wife and dies, the wife, after the decease of her husband, shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, &c.(e) Hence the ownership of the soil in the husband used to be necessary to support a claim of dower. Where, therefore, we hear of a right of dower in respect of a fishery, we must understand it to mean a several fishery, or at least such an one as drew with it the property of soil. And Bracton observes, that dower cannot be received of fish which are in inclosures.(f) Provided, however, that the ownership of the land be united with the profits of the fishing, a woman might be endowed of the fruits of this privilege. But now, by 3 & 4 Wm. 4, c. 106, s. 3, seisin in the husband is not required in order to give a title to dower, provided such dower be sued for or obtained within the period during which a right of entry or action may be enforced.(g) The common assignment of dower is, "by metes and bounds;" but it is clear that a fishery cannot be so divided, and therefore a special endowment must be made in this respect.(h) This is done by assigning her the third fish, or the third throw of the nets,(i)(k) in like manner as the

(b) 2 Id. 189, *Rex v. Meller Inhabitants*.

(c) 8 B. & C. 711, *R. v. Crowland*. As to settlement by renting a ferry. See 10 Ad. & El. 706, *R. v. Fladbury*. S. C. 4 Per. & Dav. 671.

(d) 3 & 4 W. 4, c. 27, s. 36. See also 3 & 4 W. 4, c. 106, an act for the amendment of the law of Dower.

(e) Litt. s. 36.

(f) Lib. 2, c. 40, s. 3. *Shulter's Aquatic Rights*, p. 102.

(g) See the statute, where several amendments of the old law have been effected.

(h) *Park on Dower*, p. 252.

(i) *Tertium pisces vel jactem restis tertium*.

(k) Co. Litt. 32 (a). *Plow.* 179.

third part of the profits of a store-house, or of the keeping of a park, may be conceded to her.<sup>(l)</sup> And upon the principle, that dower may be had of a common certain in contradistinction to a common *sans nombre*, of which latter a woman is not dowable,<sup>(m)</sup> it seems, that such a claim may be made in regard to a common fishery.

It follows, from the above considerations, that of fish taken in the sea, and in navigable rivers, dower cannot be taken.<sup>(n)</sup>

It may just be added here, that where there are coheirs of a fishery, [\*368] \*they shall have the second, third, or fourth fish, according to the number of persons entitled.<sup>(o)</sup>

But a piscary uncertain, or a common *sans nombre*, cannot be divided between two co-parceners, for that would be a charge to the tenant of the soil.<sup>(p)</sup> The eldest shall have those profits, making contribution, or an allowance, to the others; and if the common ancestor have left no other inheritance, then one coparcener shall have the uncertain piscary for one year, and the other for another, and so on. And in the case of the piscary, the one may have one fish, and the other the second; or the one may have the first draught, and the other the second, &c.<sup>(q)</sup>

A special endowment also must be made of mills, as their profits are not capable of being ascertained by metes and bounds, more than fisheries. Mills, therefore, being liable to dower, it remains to shew how the assignment should be made. And it seems to be agreed, that Lord Coke's doctrine is the true one, namely, that the woman shall neither be endowed of a mill by metes and bounds, nor in common with the heir; but she may be either endowed of the third toll-dish, or the whole mill for every third month.<sup>(r)</sup> The latter was the mode of assignment of dower in respect of Wade's mill in Hertfordshire, as we are informed by Serjeant Bendlows, who reported the case.<sup>(s)</sup>

The matter came to be considered subsequently, in a case where the judgment was to recover seisin of the third part of the said tenements in severalty by meets and bounds, and errors were assigned, that a mill could not be divided in that manner, &c., but that the judgment should have been of the third part only. And the judgment was accordingly reversed.<sup>(t)</sup>

(l) Co. Litt. 32 (a).

(m) Ibid.

(n) See Schultes, p. 102.

(o) Schultes, p. 102, citing Fleta, lib. 4, c. 9, s. 24. Bract. lib. 2, c. 34, s. 1.

(p) Fleta, lib. 8, c. 9. Co Litt. 164 (b).

(q) Co. Litt. 165 (a).

(r) Id. 32 (a).

(s) N. Bend. 118, 120, pl. 151. 11 Rep. 25. "For a mill cannot otherwise be divided than by the profits." 6 E. 3, 46. 45 E. 3, 50. F. N. B. 8, note (b). Id. 149 K. Perk. s. 342.

(t) 1 Lev. 185, Gilpin v. Cookson. S. C. 2 Keb. 8, 41, but the point seems to be quite different.

So in the case of coparceners, where no allowance can be made by the eldest in lieu of the mill, one shall have it for a time, and the other for the like time; or one shall have one toll-dish, and the other the second, and so on. <sup>(u)</sup>

\*The principle of supporting this claim, by virtue of the ownership of real estate, should be attended to in considering [\*364] the subject of dower as applicable to other rights mentioned in this Treatise. For whatever can be brought within the denomination of real estate, is rendered liable to be encumbered with dower. So that tolls are incidentally liable to the claim as connected with land, because they arise out of the reality, or as Lord Alvanley remarked upon one occasion, that a navigation act gave "a right in and over the soil, and certain real rights arising in and out of the soil." <sup>(v)</sup>

A bill was filed on behalf of the infant son of a testator, praying an account of the personal estate, &c.; and, on a reference to the Master, he was directed to inquire particularly, whether the widow of the testator was entitled to dower, and what was the nature of certain navigation shares in the river Avon, mentioned in the will. The question for the opinion of the Court upon this point subsequently was, whether these shares were real or personal property; and if real whether the widow was entitled to dower. Upon the first point, the Master of the Rolls observed, that this property had always been acted upon as real estate, that recoveries were suffered, and fines levied upon it. There was a perpetual inheritance arising out of lands and there were rights connected with, and exerciseable within it; and the Master of the Rolls was quite clear upon the second point, that the wife was dowable. If dower can attach upon the right of fishing, which is allowed, it would be strange if this were not equally real estate. <sup>(w)</sup>

The same doctrine has been adopted with respect to shares in the New River Company. The Lord Chancellor had early designated this property as a legal estate and corporeal inheritance; but he observed, at the same time, that the plaintiffs had done right to come into equity to recover a share, and also to obtain an account of mesne profits, because it would be difficult to bring an ejectment for a thirty-sixth part, and bits of land in several counties. <sup>(x)</sup>

It soon, however, came to be understood, that the proprietors were necessitated to levy fines in all the counties through which the river ran, in order to bar the dower. <sup>(y)</sup> And again, a fine or recovery suffered of a New River share must be in the three \*counties [\*365] through which it runs, namely, Hertfordshire, Middlesex, and

<sup>(u)</sup> Co. Litt. 165 (a).

<sup>(v)</sup> 2 Ves. Jun. 663.

<sup>(w)</sup> Id. 652, *Buckeridge v. Ingram*. See 4 Ves. Jun. 542. *House v. Chapman*.

<sup>(x)</sup> 3 Atk. 336; and see *Show. Ca. Parl. Swayne v. Fawkener*.

<sup>(y)</sup> 2 Ves. Sen. 182.

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London.(z) A man was seised in the right of his wife, of a share in the New River water, and he, with his wife mortgaged by way of lease for one thousand years, by deed *without fine*. The wife received the profits, and paid the interest after the husband's death; and now the mortgagee brought a bill to foreclose the wife, insisting that the mortgage was only voidable by the wife, and that she had elected to affirm it by paying interest when discoverd. But the Master of the Rolls said, that the lease had expired on the death of the husband, and that there was nothing to foreclose, and he dismissed the bill.(a)

These rights of dower, also, cannot be ascertained by metes and bounds, but like the case of fisheries and mills must be specially assigned; and the fair measure would be, to assign the third part of his tolls, &c., as the case might be.

The remedy by distress is incident to the enjoyment of several of the privileges which have been treated of. Thus, we have seen, if the proper suit to a mill be withheld, one of the modes open to the miller for compelling the service by distress.(b)

So if a port-toll be neglected or refused, it may be distrained for, for such a toll is not against common right, although it seems, that in a case of toll-thorough for passing along a highway, or through a town, the distress as well as the toll, must be prescribed for, because the latter requires the proof of a separate consideration to support it.(c) But a distress cannot be made for the rent of an easement between high and low water mark.(d)

The cases on this subject have been collected in the former part of this Chapter, which speaks of tolls and port duties.

Where an incorporeal hereditament can be distinguished or severed from the reality it may be the subject of devise. As in the case of a common in gross, which may be devised, although an appendant or appurtenant common may not, because such commons pass together with the land to which they are attached. And thus it is that a right of fishery is devisable. For (not to enter again upon the dispute as to the term several fishery), it is clear that an independent right of fishery may exist separate \*from the ownership of the soil, and this is devisable [\*366] right. Thus, in the case of *Rogers v. Allen*, Heath J., observed, that a right of fishery and a right of free warren, were not at all like each other; that the one was devisable, the other not.(e)

Where a person left a mill, together with a watercourse and floodgates,

(z) 2 P. Wms. 128 (n).

(a) Id. 127, *Drybutter v. Bartholemew*.

(b) See *Bradby*, p. 159.

(c) Ibid. p. 193.

(d) 8 B. & C. 141. 6 Bing. 150, *Capel v. Buzzard*. S. C. 3 Y. & J. 344.

(e) 1 Camp. 312.

to a trustee, as a provision for his family, excepting a right for the lessor of the mill to divert water for watering meadows, and also a right to put down sluices; it was held, that the heir of the lessor was entitled to certain water rents which comprised part of the profits of the mill, the exception not being repugnant to the grant.(f)

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## \*CHAPTER XII.

[\*367]

### OF INDICTMENTS AND PLEADINGS ON THE SUBJECT OF RIGHTS CONNECTED WITH WATER.

It would be a laborious and fruitless task to enumerate all the occasions upon which an indictment might be preferred for injuries done to the various rights of which we have been speaking, or, again, to mention every particular damage in respect of which an action might be brought. Some of these proceedings, nevertheless, merit more attention than others, because matters of law have arisen upon them; and, indeed, it is not proposed to omit any of the most common forms of redress in the inquiry which we are about to pursue.

The criminal proceeding by indictment, and by action for civil injuries, will occupy the chief space in the following pages.

We shall observe upon indictments which lie for obstructing navigation, upon those which may be preferred for damage to public fisheries, and such, again, as concern private rights of the description last mentioned.

The mode of enforcing penalties by a summary conviction before a magistrate, in certain cases of taking fish without the owner's consent, will next come under our consideration.

Indictments on the subjects of mills and watercourses will close this part of the inquiry.

We now come to the pleadings.

First, we shall mention those upon rights of navigation; and nearly connected with this point will be the methods of suing for port duties, or justifying seizures of goods in respect of such dues.

(f) 3 Smith 84, Lambert v. Bonnet.

[\*368] The declarations and pleas regarding fisheries will succeed, \*and after these, those which a miller is occasionally obliged to resort to, in order to regain the accustomed suit or service to his mill.

Lastly, the pleadings upon watercourses will be added, and these will conclude the Chapter.

It is clear, that there can hardly be a higher offence than the wilful obstruction of commerce. These mischiefs, however, are occasionally committed; and they are mostly found to have been done upon navigable rivers, with a view to some private interest. Thus such an obstruction might be created upon a river, for the purpose of improving the fishery; but here, it should be remembered, that the right of fishing is but a secondary privilege, and is always subservient to the benefits of an unrestrained navigation. Thus, we have a precedent of an indictment against a fisherman for placing putts, composed of wood, wooden stakes, and twigs, upon the river, so as to obstruct the free passage and navigation of ships, &c.(a) So again, for putting putts in the River Severn.(b) The particular obstruction should be accurately described.

Upon an indictment for putting loads of bricks upon the Thames,(c) it was excepted, amongst other things, that no *termini* had been set out; but this objection was subsequently abandoned, and by Lee, C. J., "not without reason," it having been overruled previously in an indictment for a nuisance in a street;(d) and Mr. Justice Chapple said, moreover, that the Court would take notice of the River Thames.(e)

Indictments against persons in respect of injuries done to public fisheries, are not of very frequent occurrence. But such proceedings are warranted by the provisions of several statutes; of those especially which relate to the use of improper nets, and those also which forbid the erection of weirs, to the damage of these public rights.(f)

Interruptions of these rights may, and indeed have often been caused by foreigners; but an appeal is then made to the law of nations, and not to our Courts of criminal jurisdiction. Moreover, if a fishing place used by the public be claimed under a prescriptive right by a private person, [\*369] the course usually pursued \*is for the individual to bring an action, for the purpose of trying the right; or if he claim as a grantee of the Crown, to settle the matter by a *quo warranto* information, calling upon the supposed grantee to support his privilege.

The act for consolidating the law of larceny has made a considerable alteration in the mode of proceeding upon an illegal taking of fish. Instead of the old form of indictment for felony, or, on some occasions, of information, the party is to be proceeded against for a misdemeanor, or may be summarily convicted before magistrates; and it seems, there-

(a) 2 Stark. C. P. 688.

(c) Andr. 137, *Rex v. Haddock*.

(f) See ante, Chap. IX.

(b) 6 Wentw. Index.

(d) Id. 145.

(e) Id. 150.

fore, that there are two forms of indictment, one under the statute, for a misdemeanor, and the other for taking away fish, like other chattels, from the custody of the person who has reduced them into his possession. This latter indictment lies at common law, and is not at all governed by the statute.(g)

But the wilful damaging of a fish pond is an offence expressly provided against by the Malicious Injuries Act. The indictment charges the breaking of the head and mound of the fish pond, and the gravamen is, that the fish have been lost in consequence of the outrage. It is necessary to allege, that the offence has been done maliciously, and proof of the act itself will be evidence from whence malice may be presumed.

With respect to summary convictions before a magistrate, cases have been already cited to shew, that the jurisdiction of the magistrate over the offence must expressly appear on the face of the adjudication.(h) One or two more observations upon the form of this proceeding will be sufficient for this part of our subject. The provisions of the act, under which the conviction takes place, must be carefully adhered to, for we have seen how highly dangerous it is for a magistrate to convict in a case where his power to do so did not appear upon the face of the proceedings. The following objections have prevailed in cases under the old law, and they may be equally applicable under the present. A conviction, which was removed into the King's Bench by certiorari, stated, that the defendant did fish with a net in a certain river, or stream, called Tame, in that part of the said river, or stream, which runneth between B. F., in the county of Warwick, and C. B., in the parish of A., in the \*said county. It was contended for the defendant, that it did not appear from hence that the act in question had been done [\*370] in the county of Warwick. *Non constabat*, but that though both the termini were in the county of Warwick, yet that the part of the stream running between them, in which the defendant fished, might be in another county, and out of the jurisdiction of the convicting magistrate. The Court considered this objection to be decisive. They could not presume that the place where the offence was committed was within the jurisdiction, but said, that it must expressly appear. It did not follow, that the intermediate course of the stream was in the same county with the two *termini* mentioned, the fact being often otherwise. The conviction was accordingly quashed.(i) It must, moreover, appear on the face of the conviction, that the proceeding against the defendant was with the consent of the owner of the fishery. It was urged, upon an occasion of this kind, that it was sufficient to say, that the complaint had been made

(g) It is usual to state the number of fish taken, but this has been held not to be indispensable in an old case for stealing carp. 1 Lev. 203, *Rex v. Wetwang*. And although the ownership of the dwelling-houses must be stated in the indictment, it seems that the fish taken need not be laid as the goods and chattels of any person, and if mentioned, that the indictment in that respect would be surplusage. 1 East, P. C. 111, *Hunsdon's case*.

(h) In Chap. IX.

(i) 1 East, 278, *Rex v. Edwards*.

on oath. But the Court held the objection to be fatal. Had the owner been the party complaining, his dissent would have been obvious; but that was not so. The conviction was quashed.(k)

So, again, an information omitted to state the want of assent of the owner, but there was this memorandum: Be it remembered, &c., that Sir H. F., at the instance, and on the behalf of, &c., (the owner), came, &c. It was contended, that this memorandum avoided the difficulty; but the Court observed, that it was insufficient for the justice to state this in the conviction, but that it must also be embodied in the information, and established by the proof. It was said, that Sir. H. F. prayed for judgment; but it was not added, that this prayer was at the instance of the owners. This conviction, also, was consequently quashed.(l) And it is obviously necessary to specify some place from whence the fish have been taken.(m)

We have seen, in a former page,(n) in what cases indictments will lie with regard to offences concerning mills. All, therefore, which remains for us in this place, is briefly to notice the proceedings in cases of arson, and riotously demolishing of mills, together with a few other indictments on other charges.

In an indictment, tried in Lancaster in 1812, the offence laid was, for setting fire to a certain cotton mill, warehouse, and shops. The second count was applied to the arson of a cotton \*mill only; the third [\*371] mentioned the warehouse alone; and the fourth the shop, independently of the rest. It was objected, that a cotton mill was not within the statute; but the Judges, on consideration, held that it was, and judgment of death was passed.(o) The indictment for riotous destruction states the damage to have been done in disturbance of the public peace, and that the offender pulled down the mill, or began so to do, as the case may have happened. It is desirable to abide, as strongly as possible, by the words of the statute, which expressly includes a mill within its provisions.(p)

Another indictment may be mentioned, namely, for breaking down the dam of a mill pond, an offence expressly mentioned in the act for the punishment of malicious injuries.(q) Here the offence is similarly charged with that of injuring the head of a fish pond, namely, breaking down the head and mound of a certain mill pond, and then stating the damage. The word *maliciously* should be contained in the indictment.

There have been other indictments on the subject of mills: as, for instance, against a miller, for changing the corn delivered to him to grind,

(k) 4 Burr. 2279, Rex v. Corden.

(l) 2 B. & A. 378, Rex v. Daman. S. C. 1 Chit. Rep. 147. 149, note (f) S. P. 2 Burr. 679, Rex v. Mallinson. S. C. 2 Lord Keny. 384.

(m) See Russ. & Ry. C. C. R. 515, Rex v. Ridley.

(n) Ante, Chap. IX.

(o) Farrington's Case. See ante, p. 252.

(p) 7 & 8 G. 4, c. 30, s. 8.

(q) Id. s. 15.



and substituting a bad quality in its room. In a case before referred to,<sup>(r)</sup> we have seen, that an indictment will not lie in general for such a dishonest transaction; but as the difficulties mentioned by Lord Ellenborough as fatal to the indictment, were very much qualified by him in that case, it is necessary that we should still advert to the proper mode of laying such an offence, because there are some occasions upon which it would be clearly indictable. There no tokens were exhibited, by which the party gained any greater degree of credit than usual; but had the case been that this miller was owner of a soke mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that the mill, abusing the confidence of this his situation, had made it a colour for practising a fraud, this might have presented a different aspect.<sup>(s)</sup> Then, again, the charge was, that the meal delivered by the defendant as and for the good barley with which he had been entrusted, was musty, sour, damaged, and unwholesome, and therefore of little or no use; and although this allegation was demed insufficient, yet Lord Ellenborough observed, that had the indictment gone on to say, that the miller had delivered it for the food of man, the charge might have been sustained. So that a dishonest miller may \*still be prosecuted [372] criminally upon some occasions. This being so, it is of course [\*372] desirable that the indictment should be properly framed. The following fatal error occurred in the case which we have already so much spoken of. It was charged upon the miller, that he had received the good barley, but no place was specified where the receipt took place. This was one of the errors alleged. A general receipt of barley was subsequently alleged, with a place mentioned, and the counsel for the Crown contended, that, if material, here was a venue, and he said, that all the following matters were to be referred to that statement of place. But the Court, on looking at the indictment, took notice that all the subsequent allegations related to the barley *so received by the defendant as aforesaid*. Here, therefore, was a material fact (admitting the thing to have been indictable) alleged without any sufficient certainty of time and place, and there might not be an inference upon such occasions.<sup>(t)</sup> There was, moreover another fatal objection to this indictment. It stated in the same count, that the miller had received two parcels of barley, of four bushels each, to be ground at his mill, and then it stated the delivery of the three bushels and forty-six pounds of oatmeal and barley meal. Now it was quite uncertain to which parcel of the barley the delivery related, and, consequently, the charge was bad for uncertainty.<sup>(u)</sup>

The charge, therefore, having been shewn to be sustainable, it has been thought right to disclose several objections which have prevailed; and it may be added, that an indictment for such an offence requires more than an ordinary care and accuracy. We have seen also, that an indictment at common law for a forcible entry and detainer will lie in respect of mills.

(r) Chap. IX.

(s) 4 M. & S. 220, by Lord Ellenborough.

(t) 4 M. & S. 241, *Rex v. Haynes*. See Lord Ellenborough's judgment, p. 219, 220, and that of Le Blanc, J., *id.* 221.

(u) *Rex v. Haynes*, *ut supra*.

The usual course is to say, that the defendants, with a strong hand, entered the premises in question, accuracy in describing which is indispensable, and that they then expelled the proprietor with a strong hand, and kept him out by a similar force. The omission of the words, "with a strong hand," has been held not to vitiate an indictment under the statute 5 Rich. 2.(v) There were four counts in a great case of this nature. The first charged the offence in the ordinary way, and the third varied the description of the mill; the second and fourth omitted the words, "with a strong hand." The indictment, on being demurred to, was holden good.(w)

[\*373] \*Although, in strict language, a watercourse is defined to be a private right of water, yet there are several precedents of indictment in which that term is urged, and which of course, must apply, on those occasions, to public rights.(x) Thus, we find an indictment for suffering a watercourse, which usually supplied certain inhabitants, to be filled up with mud.(y) So again, a charge was preferred against a defendant for obstructing a common watercourse running into a public pond by making a mound, bank, or dam, so high as to divert the accustomed flow of the water, so that the inhabitants of the parish, and all others his Majesty's subjects, were deprived of the use of the pond, and water for their cattle. A second count was added, for *stopping* the watercourse in question.(z)

There was an indictment for stopping a watercourse, and it was laid, quod quædam pars aquæ had been stopped; and it was objected, that this mode of laying the charge was bad, for uncertainty, for that it ought to have been, a certain parcel of land covered with water. The Court agreed to this, and quashed the indictment.(a)

An indictment for stopping a watercourse in Kensington, to the detriment of the inhabitants, has been holden bad.(b)

The pleadings concerning rights connected with navigation are the first to which we propose to direct the attention of the reader. And here it cannot but be obvious, that civil injuries regarding these rights are not of very frequent occurrence; because, as a general principle, if there be an obstruction of any navigation, the proper course to pursue is to prefer an indictment against the offender. The exceptions to this rule are, when any special damage has been sustained; and where, as in the case of a canal, the soil is vested in certain proprietors, who may sue an offender

(v) 6 Mod. 96, The Queen against Dyer.,

(w) 8 Term Rep. 357, Rex v. Wilson and others. See also Starkie's Criminal Pleading, vol. ii. p. 444. Wentw. vol. iv. p. 148, &c.

(x) 14 Vin. Ab. 394, pl. 10, Hughes's case.

(y) See 6 Wentw. Index.

(z) 4 Wentw. 222.

(a) 2 Bulst. 119, Rex v. Sorill. S. C. Cro. Jac. 328. 2 Ro. Ab. 80, pl. 14.

(b) 1 Mod. 107. Sir John Thorowgood's case. S. C. 3 Keb. 284.

for damage done to their estate. Of these particular obstruction on public waters, we will proceed to treat in the first instance. Thus we have a precedent of a declaration for turning and diverting the course of a navigable canal, whereby the plaintiff's barges were hindered from proceeding. It states, generally, the public right to have a navigable communication between certain places [naming them:] and further, that the plaintiff's barges were using the privilege in question. \*The diversion of the water is then alleged, and the injury sustained by the plain- [\*374] tiff. It appears, that at the trial of the issue joined in consequence of this action, the plaintiff was nonsuited, on the ground, probably, that a public injury could not be the subject of an action. But a new trial was subsequently granted, because the individual had, in this case, sustained a particular damage.(c) The same doctrine has been acknowledged more than once, where persons have been sued for obstructing the public highway.(d)

We have moreover, another precedent of an action against the owner of a wharf, for placing a large tree, or piece of timber, unfastened in the River Thames, without a buoy, so that the plaintiff's barge, which struck against the timber, received damage.(e)

However, in declaring against a person for damage, the pleader must be careful not to draw a legal inference of duty from facts which will not warrant that construction. Such an allegation of duty, indeed, is superfluous, if the facts amount to such a statement, and useless if they do not. Such facts only should be stated as will raise the question of clear obligation on the defendant's part. And the words "it *thereupon* became the duty," &c., will not be deemed by the Court to mean that it "*afterwards*" became the duty, &c., but that the defendant had become legally liable by reason of the facts expressed on the record and, in that sense, "*thereupon*" is equivalent to "*thereby*," Consequently, where the facts stated did not amount to a legal liability, the declaration was held bad, although it was urged that, "*thereupon*," meant afterwards, and not thereby. It was not a substantive allegation, but an exposition of a legal inference.(f)

Where the canal or navigation companies have a property in the soil, they can bring their action upon the case for an obstruction, in like manner as other owners of property may proceed.

A case occurred some years since, in an action brought by the Mersey and Irwell Navigation Company, in which it seems to have been held un-

(c) 2 Chit. on Pleading, p. 608, n.

(d) See Woolrych of Ways, ed. 1849, p. 84, where the cases on this subject are collected.

(e) 2 Chit. on Pleading, p. 607.

(f) 5 C. B. 399. 17 L. J., C. P. 227, *Brown and others v. Mallet*, ante, p. 203.

necessary to give a local description to the nuisance of diverting the water of the navigation; and certainly, \*such a description becomes immaterial after verdict. It was an action for obstructing the Irwell; and the damage alleged was stated to have happened at Preston. At the trial, the plaintiffs could not prove that the River Irwell was at Preston; and the learned Judge directed a nonsuit. But the Court made the rule absolute for a new trial; for the place should have been referred merely to venue; and being within the county, it was considered to have been sufficiently laid. Lord Ellenborough intimated, during the arguments, that the objection, if in any form, should have been raised on demurrer; that is to say, supposing it necessary to discuss the question, whether a nuisance should have a local description; But the Court, in giving judgment, inclined to think, that the gravamen need not be described with any local certainty. For, "how," asked Lord Ellenborough, "is a venue to be laid to the fact of the obstruction, when that takes place in the higher part of a stream flowing in one county, and the injury is sustained in the lower part of the same stream, in a different county, in which the action is brought?" (g)(h)

The plaintiff brought trover for ten pieces of timber. The defendant pleaded that the timber was obstructing a navigable river, and therefore he removed it. The plaintiff replied, *de injuria*, and newly assigned, that he had five pieces of timber, different from those mentioned in the plea, and that he brought his action in respect of them, as well as those mentioned in the plea. On special demurrer, the Court, held that the plaintiff might plead thus,—*i. e.*, that he might traverse, and newly assign. (i)

Another subject, the pleadings concerning which deserve attention, is the recovery of port duties. For these, an action \*of assumption [376] sit may be maintained; but the more convenient course, perhaps, is to take a distress, and then upon replevin brought, avowry can be made, or a cognizance, as the case may be. As, where cognizance was made by the defendants in replevin, as bailiffs to the mayor and Corpo-

(g) 2 East, 497, *The Mersey and Irwell Navigation Company v. Douglas*. S. P. Hamer v. Raymond, 1 Marsh. 363. S. C. 5 Taunt. 789, decided expressly on the authority of the above case.

(h) Some few words may be said here concerning the venue in other actions for injuries to which this Treatise relates. Thus, if there be a cause of action arising in two counties, the action may be brought in either. (Per Holt, C. J., 11 Mod. 258). As, when the defendant dug banks in one county, which did damage to the plaintiff's farm in another. (*Id.* 257, *Leveridge v. Hoskins*.) And it seems, that the cause should be tried by a *visne* of both counties. The defendant pleaded to trespass a fishery in Northamptonshire, and a prescription to draw nets in Warwickshire, upon the plaintiff's lands; and the Court said, that the issue should be tried by both counties. (Dy 267) (b). In a case where the plaintiff's fishery was in the county of Antrim, and the defendant had erected wears, &c., in the county of Londonderry, which damaged the plaintiff's fishery in Antrim, it was held, that the cause had been properly tried in the county of Antrim. (3 Ridgw. 324, *Hamilton v. Marquess of Donegall*.)

(i) 8 Q. B. 187, *Page v. Hatchett*, 15 L. J., Q. B. 68.

ration of Newcastle, claiming a custom to take toll of all wine imported therein. They stated also, that they had been accustomed to repair the port at their own expense.<sup>(k)</sup> It does not seem to be necessary to state that the port is in repair. Thus, trover was brought for an anchor, sails, and cables. Upon not guilty pleaded, there was a special verdict, by which it appeared, that the mayor and burgess of Newcastle had been used to repair the port of the town, and that in consideration thereof, they had been accustomed to have a toll of 5*d.* per chaldron for coals exported; and that, in default of payment, their water bailiff had been used to make a distress. Exception was taken, however, that it ought to have been averred that the port was in repair; that the repair was like a condition precedent, and that performance of it should have been proved but the Court would not suffer the objection to avail; for the consideration was, that the defendants had been used to repair from time immemorial, not that the defendants had actually repaired. Other objections to the plaintiffs recovering having been overruled, the Court gave judgment for the defendant.<sup>(l)</sup>

So, again, there may be a similar justification in trespass. The plea usually alleges a seisin of the port in the defendant, or in some other person; if the justification be by a servant, it then goes on to state the prescriptive right to the port duty, and to make a distress for it, if unpaid. The plaintiff is then said to have been indebted to the defendant for tolls, and the seizure, consequently, upon non-payment, is also set forth. It should be remarked here, that the consideration need not be stated, because the making of a port implies a consideration, and the prescription sufficiently shews the right to demand the duties in question.<sup>(m)</sup> And although the service is set out in the plea above mentioned, it seems that in a declaration, the ownership of the soil need not be mentioned.<sup>(n)</sup> The declaration, therefore, would simply state that the plaintiff had been accustomed to receive a certain toll or duty, without entering more at length into their title.

\*It is desirable to add here, that although it be true, that repairs are necessary to be done to keep and sustain a port for the public convenience, no one is authorised to take this law into his own hands, and to commit a trespass for the purpose of effecting these repairs, unless there be an overpowering emergency; and if there be such a necessity, it must appear upon the pleadings. The Earl of Longdale brought an action against the defendant, for breaking his manor, and, amongst other things, depositing timber, bricks, stones and rubbish there; the second plea charged a breaking of the plaintiff's close. The

(k) 8 Wentw. 124.

(l) 1 Lord Raym. 385, *Vinkensterne v. Ebdon*. 5 Mod. 356—359. S. C. 2 Lutw. 1519. S. P. 1522, *Wilkes v. Kirby*.

(m) 3 Burr. 1402, *Mayor of Yarmouth v. Eaton*. 2 Lutw. 1519—1522, *Wilkes v. Kirby*.

(n) 3 Burr. 1402, *Mayor of Yarmouth v. Eaton*.

defendants pleaded, first, not guilty, and next, that there had been immemorially within the manor, a public tort, and also a public navigable river, and that there had been an ancient work in the part of the port within the manor, which was necessary for the preservation of the port, and for the safety and convenience of ships; that at the times when, &c., this work was in decay, that the plaintiff had neglected to repair it, whereupon the defendants entered and did so. The plaintiff replied, *de injuria*. There was a verdict for the plaintiff on the first plea, and for the defendants on the second; and it was moved to enter up judgment for the plaintiff, *non obstante veredicto*, because the second plea did not state that immediate repairs were necessary, or that any one had refused to repair after notice, or that a reasonable time for repairing had elapsed, or that the defendants had occasion to use the port. And the Court held the pleading bad upon these objections, for these defendants might have been mere volunteers, not at all interested in the preservation of the work in question, nor prejudiced by the want of those repairs which they had thought fit to do. Judgment was, accordingly entered for the plaintiff.<sup>(o)</sup>

The chief actions on the subject of fisheries seem to be actions on the case, of trespass, and of trover. Assumpsit, however, may be maintained for the rent of a fishery, and it is customary in that case to declare for the use and occupation of the fishery in the river, and to add the quantum meruit count.<sup>(p)</sup>

When the fishery claimed is separate from the land, an action on the case is a proper remedy, as, according to some opinions, in declaring for a free fishery, and also when a common of fishery is the right claimed. A declaration in this latter case is similar to those concerning other rights of common, and need not, therefore, be more particularly mentioned \*here.<sup>(q)</sup> But a fatal mistake was once made by using [\*378] the phrase "common fishery," instead of "common of fishery." It occurred in a plea to an action of trespass, but the same law is applicable to a declaration. The plaintiff having complained of the defendant's fishing in the Avon, the latter pleaded, amongst other matters, a common fishery there, and he obtained a verdict upon this plea. The plaintiff's counsel, however, obtained a rule to shew cause why judgment should not be entered for the plaintiff, notwithstanding the verdict, on the ground that there could not be common fishery in a river,<sup>(r)</sup> and that the two phrases were decidedly distinct. On the other side, it was urged, that these expressions must be held to be synonymous, and that precedents had been found in Lord Chief Justice Gibbs's collection, where a common fishery had been prescribed for. But the Court allowed the objection, for a common fishery extends to all mankind, whereas a

(o) 2 B. & C. 302, *The Earl of Lonsdale v. Nelson and others*.

(p) See Chit. on Pleading p. 39.

(q) See 46 E. 3, 28. That a particular title need not be shewn.

(r) Meaning a river not navigable.

common of fishery means a right in common with certain other persons, in a particular stream. It was determined, however, that the defendant should have leave to amend, by introducing the word *of*, without payment of costs: and the rule was then made absolute for a new trial, in order that the jury might distinguish between the two rights.<sup>(s)</sup>

And it was always held, that the sort of fishery claimed should be pointed out in the declaration.<sup>(t)</sup>

This allegation of a common of fishery might also be put upon record in a plea, in bar to an avowry.

It need hardly be mentioned here, that it is almost the invariable custom to put in a plea of not guilty to these actions upon the case, upon which issue is joined.

But the action in most common use on the subject of fisheries, is trespass. Whether this mode of proceeding can be supported where the plaintiff is not owner of the soil, or not, it is still advisable to insert a count for fishing in the plaintiff's close covered with water. Then follow counts for fishing in the several fishery, and in the free fishery of the plaintiff; and, lastly, a count, if it be practicable, for catching the fish generally, in order to secure full costs. The pleadings may of course be further varied. There may be a count omitting the enumeration \*and quality of the fish, because the act of fishing is such [\*379] an infringement of the plaintiff's right as will sustain an action, although no fish be actually taken.<sup>(u)</sup> And the name of the river may be left out, the breaking and entering of the plaintiff's fishery being simply stated. The ordinary declaration, however, states a trespass in the plaintiff's close covered with water; and this mode of expression will include a trespass committed in a pond. The fishing in the water is next stated, and it is customary to mention in this place the number and quality of the fish, although it seems to be unnecessary. Formerly, however, an omission of this sort was a fatal error, which may account for the continuance of this statement to the present day. Thus, in several of the old authorities it has been held, that a declaration not shewing the number or nature of the fish, could not be sustained, and that such a fault was not helped even by a verdict.<sup>(v)</sup> But this objection is now unavailable. And is said, that if the declaration were for breaking the close as well as taking the fish, without specifying their number or kind, it would be good even on special demurrer, because the breaking of the close would be considered as the principal ground and foundation of the

(s) 8 Taunt 183, *Bennett v. Costar*. 2 Moore, 83, S. C.

(t) Hardr. 407, Anon.

(u) 1 Wms. Saund. 346, *Patrick v. Greenway* cited there. See 9 Wentw. 172; 2 Chitty, 438.

(v) 5 Rep. 34, *Playter's case*. 1 Ventr. 272, Anon. Id. 329, *Hovel v. Reynolds*. S. C. Sir Thos. Jones, 109. See also 4 H. 6, 11, B.

action, and the taking of the fish as matter of aggravation only.<sup>(w)</sup> And in the other event, namely, the statement of taking the fish, without more, and without describing and enumerating them, the omission would be cured, after verdict, at common law, or by the Statute of Jeofails, 16 & 17 Car. 27 c. 8, and after the general demurrer, or a judgment by default, by 4 Ann. c. 16, s. 1, 2.<sup>(x)</sup>

The declaration next alleges, that these fish are the fish of the said plaintiff. And where the place in question is the plaintiff's several fishery, this mode of describing the property seems to be unexceptionable. Thus, it was moved on one occasion, in arrest of judgment, that the declaration was bad for saying, *his fish*, meaning the plaintiff's, because he could not have any property in the fish, until taken and reduced into his possession. But it was argued, that being in the plaintiff's several fishery, no other than he could take them; and the Court were of the same opinion.<sup>(y)</sup> In another, case, where a similar objection was made, the Court said, that the declaration calling the fish the plaintiff's fish, would have been good upon a demurrer, by reason of the [380] local property; and the register was cited as authority.<sup>(z)</sup> The omission of these words was once made the subject of objection. The plaintiff had declared for a trespass to this several fishery, but had not said *pisces suos*, and so it was urged, that he had not entitled himself to the action, not having laid any property of the fish in him. But the Court inclined strongly against the exception, upon which the defendant's counsel betook himself to another point, and on a subsequent day judgment was given for the plaintiff.<sup>(a)</sup>

In declaring for a trespass to a free fishery, it should seem to be the most prudent course to leave out the statement of property in the fish, at least unless there be a lease, or a special grant of a right of fishing independently of the owner of the soil. For upon one occasion where the plaintiff sued for a trespass to his free fishery, and called the fish mentioned in the declaration his own, it was in vain endeavoured by his counsel to get rid of the objection. It was said, that a man might put fish of his own in a free fishery, and that a tenant in common might recover though he should declare singly, provided the tenancy were not pleaded in abatement. But the Court said, that here there was a tenancy in common, and that the case was widely different from a several right, where the party is sole tenant; and they held the declaration ill.<sup>(b)</sup>

With respect to the allegation of the continuance of the trespass, or, as it is termed, the *continuendo*, it seems the more advisable course to omit it altogether. For, although upon the principle that the trespass

<sup>(w)</sup> 2 Saund. 74, note. (1). Chit. on Pleading, vol. p. 666, note.

<sup>(y)</sup> Cro. Car. Child v. Greenhill. S. C. Sir Wm. Jones, 440.

<sup>(z)</sup> 1 Vent. 122, Pollexfen and another v. Crispin.

<sup>(a)</sup> 1 Lord. Raym. 239, Fontleroy v. Aylmer.

<sup>(b)</sup> Comb. 11, Upjohn v. Dawkins.

<sup>(x)</sup> Ibid.



of fishing, and not that of the taking of the fish, is the gist of the action, a statement of the continuando might be sustained, if it were restricted to the trespass of a few hours, yet the wrong done in so short a time would add scarcely anything to the damages; and if the trespass were confined to the mere taking, the continuando could not be supported at all. Thus it was said upon one occasion by Lord Chief Justice Holt, that he had known a case of trespass for taking oysters continuando, which the learned Judge added, could not be, and the judgment was arrested.(c) And Mr. Justice Powell observed, that when a continuando is alleged of a thing that does not lie in continuance, evidence of a single trespass upon one day could only be given, and that damages could not be recovered for more.(d) The principle in fact is, that no act which terminates in itself, and cannot be \*repeated, can be laid with a continuando. But if several trespasses be laid in a declaration with a continuando, some of which may well so be laid, but some not, the continuando shall, after verdict, be extended only to the trespasses which may be so laid.(e) And it was so adjudged in a case of trespass for breaking the plaintiff's close, throwing down his fences, and fishing in his several fishery, with a continuando as to the throwing down the fences, entire damages having been given.(f)

The declaration concludes in the usual form, by saying, that the defendant has converted the fish taken to his own use.

The plaintiff declared in case for damaging his oyster fishery. He alleged his possession of oyster beds, that the defendant navigated a ship, that the tide ebbcd and flowed where the defendant's ship was, and, that at certain periods, a ship would not float there, as the defendant knew. It was held, that, even after verdict, this was no allegation equivalent to saying that the oyster beds existed on that spot, and were liable to be injured by the passage of his vessel. This was not such notice to the defendant.(g) In the same case there was a cause, alleging that the defendant navigated his vessel in the river at unreasonable and improper times, and so injured the oyster beds; the defendant pleaded, that the place in question was an open navigable river, &c. It was held, that the plea was bad on special demurrer as being argumentative, was, nevertheless good after verdict.(h)

Of course there are many pleas applicable to these declarations concerning fisheries. The general issue is frequently pleaded, unless it be the object of the defendant to gain the right of beginning at the trial, in which case he also has that of reply. Then, again, *liberum tenementum*

(c) 2 *Ld. Raym.* 976. The case was *Ovell v. Langden*, 31 *Car.* 2, *B. R.* cited 1 *Lord Raym.* 239.

(d) *Id.* 977. See also Sir Thomas Jones, 109, *Havel v. Reynolds*.

(e) By Powell, J., 1 *Lord Raym.* 239.

(f) 1 *Lord Raym.* 239, *Fontleroy v. Aylmer*.

(g) 7 *Q. B.* 339, *Mayor, &c. of Colchester v. Brooke*.

(h) *S. O.*

is allowed to be a good plea, because, *prima facie*, the owner of the soil is owner also of the fishery.(i)

So again a right of free fishing, or of a commonable right, may be set up as an answer to these trespasses, and so again, a several and exclusive fishery may be a bar to a common of piscary. Care, however, must be taken not to plead matter which amounts only to the general issue, as where the defendant pleaded in \*trespass that he was [\*382] lord of the manor and had a fishery; and because the plaintiff sets up posts there, he pulled them down, without traversing the pulling down the posts in the plaintiff's fishery.(k) If a several and free fishery be alleged in a declaration, it seems, that answering this claim by the allegation of a several right, the free fishery should be traversed. Trespass was brought against five persons for taking fish from the plaintiff's several and free fishery. Four pleaded the general issue, but the fifth justified, by reason that one of the other defendants was seised in fee of an adjoining close, and then prescribed for a several fishery in this other defendant, and that he this, defendant, as servant to the other, and by his command, did enter, without this, that he was guilty otherwise, or in any other manner. The Court were of opinion, that this plea was bad, for the defendant should have traversed the plaintiff's free fishing, and for want of that, that the pleading could not be sustained, and so judgment was given for the plaintiff.(l)

Further, another plea would be, that the *l. i. q.* was a navigable river, where all the King's subjects had a right to fish, and this, of itself, if proved, would be unanswerable. But care must be taken to plead this as a general right, because where a prescription was alleged in respect of such a right as annexed to certain tenements, it was holden bad. A prescription for a right of common to all the subjects of the realm cannot be supported.(m) The immemorially public state of the river, where the fishing is claimed, should therefore be alleged, and the right of the subject to use his privilege will then follow as a necessary conclusion, and should be stated accordingly.

A plea of license, also, is an answer to trespass in a several fishery.

And now that we are upon the subject of pleas, it should be observed, that when the right of fishery is substantively alleged in a plea as an answer to an action of trespass, the title of the defendant must be set forth, and consequently the right to the fishing, whether it be a several right, or exist by grant, or prescription, will appear on the record. In this case, if the claim be made by prescription, it is usually pleaded as appertaining to some messuage, or land, and the right is shewn to be immemorial. If the claim be of a several fishery, an allegation, that the fish-

(i) 18 E. 4, 4. 10 H. 7, 24.

(k) 2 Keb. 57, *Hely v. Raymond*.

(l) 2 Mod. 67, *Wine v. Rider* and others.

(m) *Willes*, 265, *Ward v. Creswell*. S. C. 16 Vin. Abr. 354.

ery in question is the defendant's several fishery, seems to be sufficient, because the right to the soil is, if not otherwise \*explained, presumed to be in him who has the exclusive right to fish. The [\*383] mode of setting out an express grant is too obvious to need observation. But in setting out a prescription, the title to the right as appurtenant to tenements must be made certain; so that where a common of fishery was claimed as appurtenant to *certain* ancient tenements, the plea was considered to be bad for the uncertainty, for several titles and prescriptions must be made in respect of the different tenements.(n)

The usage accompanying the prescription must also agree accurately with the latter. So that where in replevin for taking boat oars, the plaintiff pleaded a prescription in bar to an avowry of a common of fishery, limited to certain persons fishing with a certain number of boats, the plea was deemed faulty for want of an allegation that the boats in question were the property of the persons mentioned in the prescription.(o)

The next question to be considered is the course which the other side ought to pursue to avoid the effect of the pleas. And here it may be laid down as a general rule, that if the replication deny the substance of the plea, the plaintiff may conclude at once to the country.(p) And thus it is held, by those who are conversant with the subject, to be the more prudent way to deny directly the prescriptive right, instead of concluding with a formal traverse of it, in which case the plea de injuria, with a verification, would be necessary. Such a proceeding is said to occasion unnecessary expense and delay.(q)

Upon the same principle which governed the case of *Ward v. Creswell*, before cited, a replication to a plea of a public right of fishery in the sea traversing the right would be very bad, and where the plaintiff traversed the right of the subject to take shell-fish and shells upon the rocks and sands of the sea, the Court were decidedly against it, inasmuch as it traversed matter of law.(r) It is frequently advisable to have recourse to a new assignment. Mr. Sergeant Williams furnishes us with an example of this. If an action be brought for fishing in a river, being the fishery of the plaintiff, and the trespass intended by the declaration be for fishing to the extent of two miles, and upwards—here, if the defendant plead, that he is seised in fee of so many acres adjoining the river, and prescribe for a free fishery in the river along the side of these acres, the \*plaintiff ought not merely to traverse the prescription and go to issue [\*384] upon it. And the reason is, because at the trial the plaintiffs would not be permitted to give evidence of any act of fishing by the defendant, either above or below the acres, since the question would be confined to the prescription. Here, therefore, the plaintiff should newly assign, and state, that the trespass complained of was not only for

(n) Wiles. 267, in *Ward v. Creswell*.

(o) *Ibid.*

(p) 1 Wms. Saund. 103 (b). 1 Lord Raym. 641.

(q) 3 Chitty on Pleading, p. 499, note (k). See 9 Wentw. 43.

(r) 2 B. & P. 472, *Bagott v. Orr*.

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fishing in the river adjoining the acres, but also above and below, and then the defendant would be compelled to give an answer to the whole trespass. Without this new assignment, the plaintiff, observes the Sergeant, would run a great risk of being tricked. For if the prescription were found for the defendant, he would succeed in the action, though guilty of almost the whole trespass for which the action had been brought.<sup>(s)</sup>

With regard to the plea of license above alluded to, this, of course, must be decided by the replication, concluding to the country.

A very singular case once happened, which is deserving of attention, as far as the subject of rejoinder is concerned. It was an action of trespass for fishing in the plaintiff's several fishery. The defendant pleaded a public right in an arm of the sea. The plaintiff replied a prescription for the sole and several fishery, and traversed, that every subject had the liberty and privilege of free fishing, in manner and form, &c. The defendant then traversed the plaintiff's prescription, taking no notice in his rejoinder of the plaintiff's traverse. It was the opinion of the Court of King's Bench, that the defendant ought not to have passed by this traverse, and that he had been wrong in traversing the plaintiff's right, the first traverse being material; and judgment was given for the plaintiff.<sup>(t)</sup> But this decision was reversed in the Exchequer Chamber. For the first traverse of the right of all the King's subjects to fish in an arm of the sea was clearly a bad and immaterial traverse, being an inference of law, and it had also been so taken, that if it had been proved at the trial to have been the separate right of others, and not of the plaintiffs, the issue must have nevertheless been found for the plaintiffs, not only without their being obliged to prove either possession or right, but where in fact they had neither possession nor right. Such an immaterial traverse might, therefore, be passed over, and the matter of the inducement traversed, and this had been properly done by the defendant. The judgment was reversed.<sup>(u)</sup>

[\*385] \*Another course occasionally adopted, is to bring trover for fish which have been actually taken. Where the owner of the fishery is also owner of the soil, this action may be maintained although the owner be never in possession of the fish; but in the case of a commoner, it is necessary that he should have reduced the fish into his own keeping, before he can maintain this action. An action on the case is otherwise the proper remedy. In the action of trover, however, it is observable, that the number and quality of the fish should be specified, though, perhaps, with less certainty than in *detinue*, because damages only are recovered in trover. Where, therefore, the plaintiff alleged, that he was possessed of a parcel of fish, *Anglice*, *linga*, and did not allege what parcel, his pleading was holden to be ill.<sup>(v)</sup>

(s) 1 Wms. Saund. 300, note.

(t) 4 T. R. 437, *The Mayor, &c., of Oxford v. Richardson*.

(u) 2 H. Bl. 182, *Richardson v. The Mayor, &c., of Oxford*. S. C. 1 Anst. 231.

(v) Cro. El. 865, *Gramvel v. Rhobotham*.

As many of the disputes on the subject of mills have arisen from the disturbance of watercourses attached to them, a point which we shall discuss at some length in a future page, the pleadings as to this matter will be consequently reduced into a narrow compass.

The declaration against persons for not paying accustomed suit to a mill seems to be of the greatest importance, and most usual occurrence next to that which has been already mentioned. It is not now indispensable, as formerly, to set out a seisin in fee of the mills, or to speak of any other estate in them, the title being, in fact, only matter of inducement, and therefore a statement of the possession only is sufficient.<sup>(w)</sup> The ordinary course is then to proceed, and say, that the plaintiff, by reason of his possession, of right had, and still of right ought to have, toll of corn or grain ground at the mill. Then again, the original mode of stating a consideration for the toll is now omitted, as well as the custom or prescription for the defendant to grind at the mill. The plaintiff's possession and right to the mulcture being accordingly set forth, the declaration goes on to state the grievance complained of at the hands of the defendant. It is suggested, that the defendant has been possessed of a house, and that by reason of his inhabitancy he ought to have ground at the mill. Or, perhaps, all the inhabitants and servants of a manor have incurred the liability, and then the custom to that effect also should be stated according to the truth. And, in an old case, an averment that the mill was sufficient to grind all the corn, was held necessary.<sup>(x)</sup> \*The breach for not using the plaintiff's mill concludes the declaration.<sup>(y)</sup> [\*386]

It was objected, in a case of comparatively modern authority, that the plaintiff had omitted to state what toll was due, or the consideration for it, and that he had not even alleged that the toll was reasonable. But the Court were clearly against the objection, and they sustained the plaintiff's verdict.<sup>(z)</sup>

It has been held unnecessary, moreover, to state the mills to be ancient mills.<sup>(a)</sup> So again, in an old case where an assise was brought to recover a mill, and the sort was not mentioned, whether water or wind mill, it was said to be unnecessary to make such a distinction.<sup>(b)</sup>

But where an exemption from tithes was relied upon in equity, and the pleading was, that the mill was an ancient mill, built before living memory, that no tithes had ever been paid for it, and that it had always

(w) 2 Ventr. 291, *Chapman v. Flexman*. 2 Wms. Saund. 113 (a), n. (1).

(x) Thos. Raym. 237, *Alot v. Jackson*; *Gooby v. Knight*, cited.

(y) See also 8 Wentw. 523.

(z) 6 M. & S. 69, *Gard v. Collard*.

(a) 2 Saund. 114. 117, *Coryton v. Lithebye*.

(b) 21 Ass. pl. 23. *Bro. Demande*, pl. 18, cites S. C. See as to a difference between the claim of a mill and a mill house. 44 Ass. pl. 27, S. C. 44 E. 3, 13. See also *Bro. Demande*, pl. 33.

been considered exempt from tithes: the Vice Chancellor said, that although the first statement might not be sufficient, the subsequent passages removed all doubts as to the nature of the defence, and the exemption was accordingly held to have been well laid.(c)

An exception was taken upon one occasion, that the plaintiff had entitled himself by a lease from the dean and chapter of D. of the mills to which he claimed his suit, without saying any thing respecting the suit. And it was held, that the objection was invalid, for first, although there was no expression of this suit in the lease, it would pass, nevertheless, as an appendancy of the mills; and then, secondly, the lease might be pleaded without any mention of the suit.(d) Suit to a mill had been very early looked upon in the light of an appurtenance to the mill.(e) Another objection was unsuccessfully urged in the case cited from Bulstrode, namely, that the time of erecting the new mill which the plaintiff made the subject of his action, had not been shewn, for the Court said, [\*387] that it should be taken by \*intendment that the defendant had erected a mill contrary to the custom.(f)

In an action of covenant for the non-repair of a mill, the plaintiff did not state whether it were a corn or a fulling mill, and an exception was taken on that account; but the Court said, that the breach was, not repairing a mill, which was the *gravamen*, and that the specifying of the mill was not material.(g)

It has not been thought necessary to enter into the proceedings under the old writ, *secta ad molendinum*, because, it has been abolished by the 3 & 4 Wm. 4, c. 27, s. 36.

There are other actions on the subject of mills, but it is not desirable to enter too fully into details upon which no important questions have arisen. The reader, however, is referred to the precedent of a declaration for a very serious grievance, namely, the mixing of corn sent to be ground at the mill with other grain of an inferior quality.(h)

The course which we propose to adopt in treating of the pleadings relating to watercourses will be, first, to mention those which relate to the disturbance of rights enjoyed in such waters, and the injuries done to millers will naturally form a separate branch of this inquiry. Secondly, we shall speak of the pleadings in those actions which are brought for damages sustained by reason of the watercourses themselves, as where

(c) 2 Sim. 297, *Townley v. Colegate*; and see *Id.* 305, *Brown v. Woolsey*.

(d) 2 Bulst. 195, *Hix v. Gardiner*.

(e) 17 E. 3, 64.

(f) 2 Bulst. 195, 196, *Hix v. Gardiner*.

(g) Cro. Jac. 557, *Bressey v. Humphreys*. S. C. 2 Ro. Rep. 144, nom. *Presley v. Humfries*. It was also objected, that it had not been shewn in what vill certain mills were situate, but the Court said, they should be intended to be in the same vill where the mill was.

(h) 2 Chit. on Pleading, 508. When this offence is criminally punishable, and when not, see ante, Chap. VIII.

gutters are suffered to overflow improperly; where a stream of water creates such an inundation as to injure the surrounding property, with such like matters.

As to the first point, the declarations are numerous, and of great variety. They are almost universally actions on the case, not merely because the rights themselves are frequently easements, but because the damage is most commonly consequential, and not therefore the subject of an action of trespass. Thus, there are precedents of actions on the case for washing the skins of beasts in a stream into which noxious liquors had been infused; for injuries to watercourses for watering cattle; for obstructing the use of a watercourse for the benefit of the "plaintiff's land by cutting a trench; together with many others of a similar nature. [\*388]

The action being grounded upon possession, the statement as to title is pleaded as matter of inducement only, and no allegation of a seisin in fee is required. It was so decided upon special demurrer. A declaration stated a possession of certain waste land, together with a grant to the plaintiff to dig for clay in a certain parcel of the waste land, and to make pits and leats for the due exercise of the license granted. It was then averred, that there were such pits and leats on the waste land. The damage stated was a disturbance by the defendant, by destroying certain dams lawfully made by the plaintiff for the enjoyment of the clay pits. The Court distinguished *Richards v. Fry*,<sup>(i)</sup> because in that case there was no allegation, as here, of the plaintiff being in possession.<sup>(k)</sup> And by Parke, B., "the authorities in *Cro. Jac. & Owen*, are decisive against the objection. If an averment of seisin is necessary in the first instance, the case would then fall within *Richards v. Fry*; but the defendant, being a wrong doer, has no right to call on the plaintiff to shew title. The title is an inducement, and need not be pleaded with the same certainty as if the plaintiff's claim were founded on his title." Judgment was given for the plaintiff on demurrer.<sup>(l)</sup>

A very material principle necessary to be adhered to in declarations of this sort, is to shew distinctly that the plaintiff has sustained some injury from the diversion of the stream. Thus, where case was brought for maliciously turning aside part of the course of a conduit, running from a fountain in Clerkenwell to the plaintiff's house, neither the writ nor the count stated that the plaintiff was owner of the site at the time of the mischief, but only after the action commenced. In this case, it is said, the judgment was ultimately given for the plaintiff; but that he confessed satisfaction of his damages, and that the defendant then brought a writ of error.<sup>(m)</sup>

(i) 7 Ad. & El. 698. 3 Nev. & P. 67.

(k) 3 Exch. 454, *Thruscott v. Martin*. S. C. 6 Dowl. & L. 489. 18 L. J., Exch. 291; and see *Ow. 109*, *Escot v. Lanniny*. *Cro. Jac.* 70, *Dagg v. Penkevion*.

(l) S. C.

(m) *Bendl. 115*, S. C. *Dy. 319* (b), *Moore v. Dame Brown*. See 3 Taunt. 137 *Vowles v. Miller*; and post in this Chapter.

However, upon the offering of a similar objection in a subsequent case, the Court disallowed it, thereby holding that the declaration need not state when the cause of the first nuisance took place. For it was expected, [\*389] that the nuisance was supposed \*to have been done before the commencement of the plaintiff's title, and thus that there was no cause of action; but judgment was given for the plaintiff.<sup>(n)</sup>

With regard to the allegation concerning the use of the particular watercourse, it was said by Lord Chief Justice Holt: "Suppose a watercourse, run to my ground, and I have no use for it, and one upon another ground divert it before it come to mine, will an action lie? Is not this the same? Must you not lay some use for it?"<sup>(o)</sup> And it is certainly customary to lay some such benefit in the declaration, or that the water was necessary for the plaintiff's mill, for his house, &c.

Thus, where the plaintiff declared, that by reason of the possession of certain premises, he was entitled to the use of the stream of water running through those premises, for the purpose of supplying them with water, the Court held, that he was bound to allege and prove, that he had sustained damage for want of a sufficient quantity of water; and, consequently, that as the jury had found that the dam erected by the defendant, which was the thing complained of, had not injured the plaintiff, the verdict must be entered for the defendant.<sup>(p)</sup>

However, there certainly is a case where it was determined, that the particular use of the easement need not be set out. It was an action for diverting a watercourse, and it was moved in arrest of judgment, that the use had not been mentioned, whether for the plaintiff's cattle, for his family, or his field: and it was urged, that it could not be actionable to divert water which was not useful in the course which it took. Judgment was given for the plaintiff, notwithstanding this objection.<sup>(q)</sup> But it is clear, that in this case the objection came too late after verdict, inasmuch as some use must have been proved at the trial, or the jury would not have found for the plaintiff. Upon a demurrer the matter might have a different result, and therefore it is desirable to set out the use for the watercourse in question.

So it was held, that the omission of the mode by which the watercourse had been obstructed, as per ripas, was immaterial after verdict.<sup>(r)</sup>

[\*390] One prescribed to have pot water out of a river. Issue was \*found thereon, and the verdict was, that he used to have it, paying 6*d.* by the year. This was held to be a verdict against the plaintiff.<sup>(s)</sup>

(n) Cro. El. 191, *Westbourne v. Mordant*. S. C. 16 Vin. Ab. 33.

(o) 1 Show. 64. (p) 2 B. & C. 910, *Williams v. Morland*.

(q) 2 Show. 507, *Glynne v. Nichols*. Combs. 43, S. C. S. C. Noy. 135.

(r) 1 Lord Raym. 452, *Anon.*

(s) Cro. El. 404, cited by Popham, C. J., in *Gray v. Fletcher*.



A difficulty was made upon one occasion, because the plaintiff had said, that his watercourse had run through his land till the 1st of May in such a year, which was before the action, and before the stopping laid in the declaration, so that it did not appear that the watercourse continued at the time of the diversion. But as the plaintiffs charged the defendant with the diversion on a subsequent day, which was found by the verdict the Court said, that they could not but intend that the watercourse continued.(t)

The allegation of possession is sufficient in a declaration without shewing title. It was so decided in one of the cases which we have already quoted, in which the want of title was alleged as one of the exceptions in arrest of judgment, but without effect.(u)

And the same doctrine is to be found in other decisions, and is the rule adopted at the present day ; for possession is a sufficient title against a wrong doer.(v) In a declaration for diverting a watercourse, there was an averment, that one J. T. was tenant to the plaintiff, who was entitled to the reversion. J. T. turned out to be a mortgagor in possession. The Court held, that he was tenant to the plaintiff, and that the averment was supported by the evidence.(w)

It is usual to say that the watercourse was accustomed to run as well as that it ought to run in a particular manner.(x)

No termini need be stated as necessary ingredients in the declaration. Thus, the plaintiff declared, that he was possessed of an ancient messuage in Somersetshire, and that a certain \*watercourse ought to have [\*391] flowed, and yet ought to flow into a certain fountain ; and that as often as the well overflowed, the water ran into the plaintiff's house, for his necessary use ; but that the defendant maliciously dug and subverted the ground near to this well, and placed a cistern near it, so that the water was diverted, and did not overflow as it had been accustomed to do. It was moved to arrest the judgment : 1. For the want of termini. 2. Because the declaration omitted to state that the water used to overflow. 3.

(t) Yelv. 161, *Stone and others v. Bromwich*. In this case the plaintiffs had declared as tenants in common, and had shewn their several titles in the declaration ; and it was objected, that they ought not to have joined ; but the Court overruled the objection, observing that this was a matter concerning the possession, whereby the profits of the land were diminished.

(u) Comb. 43, *Glyn. v. Nichols*.

(v) 1 Show. 64, *Palmer v. Keblethwaite*. Skin. 316, *Jackson v. Savage*. 2 Lord Raym. 1568. 1 Wils. 174, *Brown v. Best*. The following cases, therefore, on Watercourses, as far as they deny the sufficiency of this mode of declaring, are not law. 2 Show. 81, *Pepyn v. Bustine*. Id. 195, *Scoble v. Skelton*. In this last case the watercourse was said to run to the plaintiff's messuage or tenement, and it was held well enough, because every messuage is a tenement.

(w) 5 B. & A. 604, *Partridge v. Bere*. S. C. 1 D. & R. 272. See 5 Bingh. 421, *Doe d. Fisher v. Giles*.

(x) See 1 Show. 350, *Jackson v. Salway*.

Because no sufficient diversion had been alleged. But the Court held, that no terminus need be stated; and as to the other informalities, that they had been cured by the verdict.(y)

A case once occurred, in which the respective meanings of the words "erected," and "exalted," came in question. The declaration stated, that the defendant *exaltavit stagnum* and the jury found *quod crexit stagnum*. Upon this it was argued, that the plaintiff could not recover, for that these terms were not synonymous, *erigere* being *de novo facere*. And the Judges were at first of that opinion, saying, that *exaltare* meant in *majorem altitudinem attollere*. But we are informed, that the judgment was at length affirmed (the deliberation was upon a writ of error), the Chief Justice(z) having induced the other Judges to come over to his opinion, which was, that the words in question had the same meaning.(a)

Too much care cannot be used in describing very accurately the mischief complained of. This precaution will be fully illustrated by some decisions which have taken place upon the subject, and which we have postponed to a future part of this Chapter, where declarations for obstructing watercourses belonging to mills are treated of.

But the action which most usually occurs, and upon which the most numerous questions have arisen, is for the disturbance of mill streams. The injuries are, in general, the diverting of water from the plaintiff's mill, or penning it back in such a manner as to obstruct the wheels of the mill. The declaration commences with a statement of possession in the plaintiff, the sufficiency of which has been already so fully mentioned in analogous cases, as to need no further notice here than to refer to the authorities in favour of the position.(b)

[\*392] If the defendant should claim, in one plea, water at all times, \*and in another claim it only in time of flashes, the Judge will discharge the jury as to the claim in time of flashes, if the jury find the right in the defendant's favour *at all times*.(c)

With respect to the words "was and still is" possessed, the latter expression "still is," seems to be immaterial, it being sufficient to shew, that the premises which have sustained the injury were in the plaintiff's possession or occupation at the time of the damage. This point was decided in an action upon the case for digging a bank. It appeared that the close at the time of the injury was in the possession of James and Henry Vowles, but at the time of the action brought it was possessed by James only. By Mansfield, C. J. : You must support your declaration by proving, that when the injury was committed, the close was in the occupation

(y) Comb. 231, *Prickman v. Trip*. S. C. Skin. 389.

(z) *Wray*.

(a) *Godb. 58, Gile's case*.

(b) *Cro. Car. 499, Anon.* Comb. 43, *Glyn v. Nichols*.

(c) *Per Littledale, J., in Drewett v. Sheard.* 7 C. & P. 465.

of the persons mentioned in the declaration; and then you have done enough.(d)

In an action on the case, the mayor and burgesses of Liskarrel declared upon their seisin of three water mills in L., and that they and all those in the said mills, for them, *their tenants and farmers*, from time whereof, &c., have had their watercourses, &c. But it is observable, that the declaration did not add to *tenants and farmers*, the words "*of their mills*;" upon which, after a verdict for the plaintiffs upon not guilty, it was moved to arrest the judgment. But the Court said it was to be so intended and not that the tenant and farmer was farmer of any other thing.(e)

The count proceeds to state the situation of the premises, but although the venue is local, there need not be a local description of the nuisance.(f)

"By reason thereof."—The following case will shew that these words cannot always be inserted with safety. The plaintiff declared on his possession of a cotton mill, and that *by reason of his possession*, he ought to have had the use and benefit of certain rivulets; and he then complained of the defendant for cutting a channel, which impeded the working of the mill. It appeared at the trial, that there was a tunnel or goit above the plaintiff's river, which mainly assisted the course of the water enjoyed by the plaintiff; that this tunnel had been made in part over an old road purchased by the defendant about eight years since. The defendant, at that time, agreed to let the plaintiff \*lay the tunnel there, for [\*393] the purpose of conveying water to his mill, and he even assisted at the making of the tunnel, under the plaintiff's direction. No conveyance of this land was, however, made to the plaintiff. The price which the defendant had given for this piece of old road was a guinea, and the plaintiff was to have the land for the same money. The guinea was afterwards tendered to the defendant by the plaintiff, but he refused to receive it, or give his assent to the continuance of the tunnel; and, on the contrary, he made the channel which was the subject of the declaration. Upon this it was objected, that here was a right claimed over the defendant's land, which could not pass by parol license without deed, that the plaintiff had declared on his possession, whereas his title arose only by virtue of the agreement. The learned Judge having permitted a verdict to be taken for the plaintiff, being of opinion against the objection, it was moved to enter a nonsuit, and the Court made the rule absolute; for the allegation could not be sustained without shewing that the appurtenances were legally such. The title to the flow of this water over the defendant's land could not pass by parol license without deed. Then the plaintiff had this easement by mere license, or by contract; if by the former, he could not rely on his possession, because the license was revocable at any

(d) 3 Taunt. 137, Vowles v. Miller.

(e) Cro. Jac. 263, Sir Wm. Wrey v. Vesper.

(f) 2 East, 497, Mersey and Irwell Navigation v. Douglas, ante.

time; and with regard to the latter, the enjoyment with the defendant's assent was not left as evidence to the jury to presume a grant, but was supposed to give a title in point of law, which, however, it did not.(g)

It should just be observed here, that the mill need not be described as ancient, for the lawfulness of the man's possession is sufficient to defend him against the attacks of a wrong doer. And thus the Court determined upon an objection taken, because the mill was not stated to be ancient, for there was a lawful possession in the first instance; and then the stopping of the water followed, which was tortious, and a damage to the mill.(h)

In a recent case, the declaration stated the possession of a water mill by the plaintiff, and the defendant's possession of another water mill, together with the immemorial right enjoyed by the plaintiff. It appeared in evidence, that the defendant had an ancient mill; and that the plaintiff's mill had a new wheel of different dimensions from the old one, requiring less water, and that the plaintiff's old mill had been burnt down. [\*394] The learned Judge nonsuited the plaintiff, but this opinion was corrected upon a motion to have a new trial, although it was urged, that the plaintiff ought to have shewn his possession of an ancient mill, in order to have entitled him to sue another whose mill was proved to be ancient. For the Court said, that here was a prejudice to the owner of the mill, the water having been used to flow in a particular manner; that if the plaintiff had declared in respect of a mill of a given construction, the result might have been different; but that there must be a new trial, it not being in the power of the defendant to deprive the plaintiff of an advantage which he had lawfully acquired.(i)

The accustomed enjoyment of the water is next mentioned, and the general statement that the stream has been wont to flow to the plaintiff's mill is sufficient, without setting forth his title more at length.

We now come to the account of the defendant's injury, so that the declaration may be said to resolve into two principal divisions, namely, the plaintiff's property, and the damage done to that property by the defendant. The mala mens of the defendant being stated, the particular damage is set forth, whether by cutting channels, &c., or otherwise; and it is usual to lay the mischief complained of with a continuando, although the omission of the latter will not vitiate the declaration.(k) The usual expression concerning the diversion of the stream is, "divers large quantities of water," and the old authorities agree well with this mode of pleading. As where it was alleged, that the defendant much diverted the course of the water, by erecting a dam across the current;(l) and so

(g) 4 East, 107, *Fentiman v. Smith*.

(h) Cro. Car. 575, *Sands v. Trefuses*. S. P. 3 Mod. 48, *Hebblethwaite v. Palmer*. 2 Wm. Saund. 114. 1 Ventr. 237.

(i) 1 B. & A. 258, *Saunders v. Newman*.

(k) 11 Mod. 257, 258, *Leveridge v. Hoskins*. The words "kept and maintained" were once objected to. Mo. 449.

(l) Dy. 248 (b).

again, that he diverted the major part of the course of the water.<sup>(m)</sup> In another case an exception was taken, because of the uncertainty of the words *magna pars aquæ*, it not being known how much water was comprehended within those expressions; but it was resolved, that although the declaration might have had a better form, it was good in substance for that it was impossible to shew how much water ran to mills, and because the quantity of water was not material.<sup>(n)</sup>

In an old case it appeared, that one had an ancient watercourse, and the banks of the river having become false and hollow, a dam was made by the direction of certain justices, and \*so the river was holden in. Another person, who was not the owner of the ground, having cut this dam, an action on the case was brought for subverting the bank of a certain river. But the declaration was deemed insufficient, and the plaintiff was allowed to have a new writ concerning a certain *dam* holding in the said river.<sup>(o)</sup> [395]

It is customary to say, that the water has been diverted from the plaintiff's mill; but a case has occurred, in which an objection taken by reason of the omission of that statement, was disallowed, it being sufficient to say that the water was turned from its usual ancient course.<sup>(p)</sup> It is, nevertheless, unwise to depart from the usual course of precedents.

It was objected upon one occasion, that no place had been mentioned where the nuisance had been erected; and it was said, that it might have been in another mill. But the Court denied the objection, observing, that the damage should be intended in the same vill where the mill was. It was further excepted, that the action ought not to have been against the defendant, a lessee, because he had the demise subsequently to the injury complained of, for the lessee could not abate that which was done in the time of his lessor, and the request to abate should have been made to the lessor. But this difficulty was also set aside, for the Court held this to be a continuance of a nuisance by the lessee, and so the plaintiff had judgment.<sup>(q)</sup> However, if the plaintiff undertake to name the place where the mischief occurred, and he do it inaccurately, he will be in imminent danger of a nonsuit. As in an action for a nuisance in erecting a wear, and thus injuring the plaintiff's mill. The wear was described in the declaration, to be at the Hulbrook, but it was proved, in fact, to have been erected at the lower part of the same water called the Tame Water. Upon this the plaintiff was nonsuited, and the Court of King's Bench refused to interfere.<sup>(r)</sup>

<sup>(m)</sup> Ibid. *Wilkes v. Serle*, cited there. Cro. Jac. 324. 4 Rep. 89.

<sup>(n)</sup> 4 Rep. 89, in *Cottel v. Luttrell*; *Luttrell's case*.

<sup>(o)</sup> Hob. 193, *Biccot v. Ward*. Some sort of obstruction, or injury, must be specified. 1 Lord Raym. 452.

<sup>(p)</sup> 5 Mod. 206, *Richard v. Hill*. <sup>(q)</sup> Cro. Jac. 558, *Brent v. Haddon*.

<sup>(r)</sup> 2 East, 500, *Shaw v. Wrigley*, cor. *Wilson, J.* York Summer Assizes, 1790, cited there. See *Id.* 497, *The Mersey and Navigation Company v. Douglas*.

The particular mode of obstruction cannot be too carefully described. Some of the following cases on this subject do not relate to mills; but they are so intimately connected with the point of variance, as to render it desirable that all the decisions relating to that matter as to water-courses, should be consolidated. [\*396] \*These are the cases which have already been hinted at in a recent page,<sup>(s)</sup> and as they do not seem to be quite consistent with each other, they deserve a particular attention. In the first case, the plaintiff declared for a nuisance. He alleged that he had a certain channel or watercourse, whereby all the surplus or refuse water of his house was accustomed to be carried off, and he complained of the defendant (treasurer of the London Dock Company) for throwing a quantity of earth, gravel, &c., near his house, which obstructed the free passage of the water in its former course. It appeared in evidence that the plaintiff had a house in a court, situate in a row, having a steep descent of three or four feet between one end of the court and the other; that a wall stood across the lower end, and that, at the bottom of this wall, there was an aperture to let the rain and other surplus water of the court to flow through it into a ditch which ran at the back of the house, serving as a sewer to them. The London Dock Company had some land on the opposite side of the ditch from the court, and they had heaped up a considerable mound of earth which had been taken out in excavating their dock. The base of this ground was at the part nearest to the ditch, nearly as high as the plaintiff's house; but it was originally several feet from the ditch. It appeared further, that much of this earth had been trodden down by boys and cattle, beaten down by carriages, and washed down and mouldered by the rain and the weather. The ditch, partly from the fall of this soil, and partly by the rubbish which had been placed by other persons at the side of it, had become greatly impeded and choked up. The inhabitants of the court had been used to cleanse the ditch; but this act had, of late been twice done by the dock company. A verdict was found for the plaintiff by consent, in order to take the opinion of the Court, whether under these circumstances, the action could be sustained; and the Court held it impossible that evidence could be admitted to shew an injury by suffering the fall of the earth, under a statement that the defendants had heaped up earth. The declaration had stated, that the company had placed this rubbish so as to obstruct the ditch: but the mischief had been occasioned by other causes, namely, by the elements and the boys. This was a consequential injury in its strictest sense, and not an immediate act of the company. The rule was accordingly made absolute to enter a nonsuit.<sup>(t)</sup>

In the next case the declaration consisted of three counts; but the two first having been abandoned at the trial need not be further noticed. [\*397] The third count stated a diversion of the \*watercourse. The evidence in support of this was, that the defendant's son had let down the wear of a dam, so that the plaintiff's meadow was flooded and

(s) Ante, p. 385.

(t) 5 Taunt. 534, Fitzsimons v. Inglis.

damaged, the course of the stream having been thus checked. The learned Judge upon this directed a nonsuit; and the Court sustained the opinion, that the count relied on in a case of this nature ought to be so framed as to meet the particulars of the fact more distinctly, and with greater certainty.<sup>(u)</sup>

However, the following decision, subsequent in point of time to the above cases, seems hardly to be reconcileable with them. An action on the case was brought for diverting water from the plaintiff's mills. The obstruction laid in the declaration, was the putting a dam across the stream, and cutting above and higher in the stream than the mill-sluiques, trenches, channels, &c., so that large quantities of the plaintiff's water were thereby diverted, and the accustomed flow of the watercourse was stopped. There was a general count for turning the water out of its usual course. The evidence was, that the defendant put down the dam in question about a mile above the plaintiff's mills, and this had prevented the water from being regularly supplied, but that the water was not thereby diverted, because it returned to its regular course long before it reached the plaintiff's mills, and there was no waste of the water. It was proved that the plaintiff had sustained injury by reason of the interruption of his regular supply. It was upon this objected that the mischief had been misdescribed in the declaration, for the complaint should have been that the water has been irregularly or insufficiently supplied, or that it did not reach the plaintiffs' mills at the proper and the usual time. The jury having found for the plaintiffs notwithstanding, it was moved to enter a nonsuit upon the above objection, but Mr. Justice Burrough said, that it was in fact stated in the declaration, that the water did not run the plaintiffs' mill as they were accustomed to have it, and that this was a mere technical objection, which ought not to be allowed after verdict. The rest of the Court concurred in this view of the case, and the rule was refused.<sup>(v)</sup>

The gravamen, or result of the damages done by the diversion or obstruction of the watercourse, comes lastly to be stated. It is usual to insert this statement, although there are authorities to shew, that the omission of it would not be fatal. As where the plaintiff declared for a diversion, and actually left out this part of the pleading. The objection was taken, but the Court would not entertain it. For as the act implied a tort in itself, the per \*quod was necessary to support the action; it only served to aggravate the damages. The allegation was, that [\*398] the watercourse could not flow to the plaintiff's mill by reason of the obstruction, and thus a tort was disclosed which dispensed with the further statement, at least, as far as the necessity of it was concerned, and especially again, after verdict. Judgment was given for the plaintiff.<sup>(w)</sup>

(u) 6 Price, 1, Griffiths v. Marson.

(v) 7 Moore, 345, Shears v. Wood, Baron v. Guildford.

(w) 1 Lord Raym. 102. Richards v. Hill. S. C. 5 Mod. 206. See also 1 Lord

Other counts, varying the matters charged against the defendant, are commonly introduced. For example, there may be one alleging a general diversion of the water, without shewing the means; another for widening cuts from the stream, &c.; and a count for not keeping the banks of the river in repair, is said to be proper in order to avoid a risk, namely, of not being able shew that the defendant made the cuts or channels stated in the first count.(x) Perhaps, too there may be a right in the defendant to irrigate his fields at certain seasons of the year. It is advisable to insert a qualification or exception to this effect in a separate count, and care should be taken to preserve the exceptive statement throughout the count.

The above may suffice as an example of the declarations upon this subject; but there are many others, in which the causes of complaint and the resulting injuries may be infinitely diversified: to some of these the reader is directed in the note.(y) The counts are in many instances very special, but must be adapted to the peculiar circumstances of each case, as in the declaration at the suit of a miller against the occupier of another mill lower down the stream. The first count set out the damage generally; the second was for keeping the tumbling bay narrower than it might have been; a third, wrongfully continuing a mill, injurious to the plaintiff, lower down the stream; the fourth, for erecting three large wheels; the fifth, for keeping one wheel for a certain large admeasure-ment. There were other counts for keeping conduits, watergates, &c.(z)

The declaration stated, that the plaintiff was in possession of a close and pond, and that the defendant was possessed of a close used as a private road, and that the defendants wrongfully \*made a sewer, and [\*399] diverted the water of the pond. It was held, that the plaintiff had shewn no special reason, or tenure, why that the allegation concerning the private road, was surplusage, and the plaintiff was not bound to establish it in proof. Neither could the defendant, under not guilty, take objection to matters of inducement.(a)

We have just drawn the attention of the reader to a count for keeping the banks of the river in repair. In an action against a corporation, for not repairing a certain creek, it was objected, why the corporation should repair, and it was urged that they were not bound of common right. But the Court answered, that an immemorial usage to repair had been proved, which shewed an obligation and prescription, and the very condition and terms of their creation, or charter might have required this liability on their parts.(b)

Raym. 274. Id. 493, acc. Skin. 65. 175, although there seemed at one time to have been a different opinion upon this subject. See Palm. 504.

(x) 2 Chit. on Pleading, 503, note (k).

(y) 8 Wentw. 535.

(z) See 8 Wentw. Index, p. 65. 3 Chitty, 438.

(a) 1 Bing. N. C. 588, *Dukes v. Gosling*.

(b) Cowp. 86, *The Mayor of Lynn v. Turner*, in error.



So in case for the nonrepair of drains, the declaration alleged that it was the defendant's duty, as owner and proprietor, to repair his drains adjoining to the plaintiff's dwelling-house. The breach was that the defendant wrongfully suffered the drains and sewers to become foul, and in bad repair. This was held bad upon general demurrer; it did not allege any ground of liability. The words "owner and proprietor" did not import that the party was occupier.(c)

It now becomes our duty to mention some of the answers which may be given to the complaints above stated in declarations. A declaration in case charged the wrongful erection of a mill on a close belonging to the plaintiff as reversioner, and that the defendant wrongfully continued the building. The pleas were, not guilty, and that the mill was not wrongfully erected modo et formâ. The plea of not guilty was held to put in issue the fact of the wrongful continuance only; and the same—the wrongful erection by a particular person.(d) Mistakes have been sometimes made by pleading, which, at most, amounted to the general issue only, and too much care cannot be had to deny the plaintiff's right in a clear and effectual form. The defendant pleaded to an action for diverting a watercourse, that all the water alluded to sprang in his own ground; that certain pits, mentioned in the declaration, had been there immemorially for the benefit of the meadows and cattle; and that the pits being choked up with mud, he dug \*other pits, and made dams and banks, &c.; and the defendant then denied that any other ponds [\*400] had been obstructed. The plaintiff protesting that this plea amounted to the general issue, replied *de injuriâ*, concluding with an averment, upon which the defendant demurred. And the Court held, that the plea amounted in reality to a confession of the plaintiff's action, and that the plaintiff could not conveniently take issue on such a plea. The defendant, in point of fact, had claimed a right to keep out all the water if he pleased, and thus had done no more than plead the general issue, inasmuch as if the case had gone to trial, and it had appeared that the defendant had this exclusive right, there must have been a nonsuit. The course which the defendant should have pursued, ought to have been to deny the plaintiff's right.(e) Another thing worthy of observation is, that one prescription cannot be pleaded against another without a traverse; and this mistake may be said to be in some respects similar to that just mentioned, since the allegation of such a prescription, without a traverse, would be an informal general issue. Thus in a case where the plaintiff had set out a title in his declaration, the defendant by his plea set forth another prescription for the convenience of watering his cattle, and the plaintiff demurred generally. The plea was adjudged to be bad, because it neither confessed nor avoided the declaration, nor yet traversed the matter alleged there.(f) In this case, also, it was holden by the Court, that if, upon the general issue pleaded, it had been proved that the water

(c) 3 Q. B. 449, *Russell v. Shenton*. S. C. 6 Jur. 1083.

(d) 14 L. J., Q. B., 322, *Greenfield v. Edgcombe*.

(e) 1 Wils. 174, *Brown v. Best*. (f) Carth. 116, *Murgatroid v. Law*.

did not always run to the plaintiff's house, but that it was usually dried up in the summer, or drink up by the defendant's cattle, the plaintiff would have failed in his prescription;(g) whence it follows, that the greatest accuracy is requisite in setting forth a prescription.(h)

But in the following case the plea was held not to be argumentative. The plaintiff declared, in case that he was possessed of a mill and watercourse, that he enjoyed the water by means of a weir, but that the defendant pulled down the weir, \*and fixed it at a lower height. The [401] defendant pleaded, that he and other occupiers had for twenty years next before the commencement of the suit, enjoyed the right of moving the weir at pleasure. The plaintiff demurred, alleging for cause that this plea was argumentative, and amounted to the general issue. But the Court overruled the demurrer; for the plea gave colour to the plaintiff, by admitting a right at the time of the trespass, and it then set up a defence not inconsistent with it, by the perfecting of the defendant's right at the end of twenty years before action brought. The plea was also good by way of confession and avoidance. And it was said, that no title under Lord Tenterden's Act could be good at the time of the act done, however long the possession might have been.(i)

Case was brought for digging and widening the channel of a watercourse. Plea: that the occupiers of a mill had enjoyed a watercourse for twenty years, and had scoured and widened in order to continue their enjoyment of it. It seems, that this plea would have been bad had it stated the right to scour and widen without shewing for what purpose. The right of scouring was connected with the right of watercourse, and was properly put in issue as an entire claim.(k)

However, the rules of pleading in Hil. T. 1834, have worked an alteration as to the management of the general issue.

Thus, in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. The following is given as an example

(g) *Id.* 117.

(h) *Id.* *Ibid.* An action on the case was brought against the defendant for permitting offensive smells to annoy the plaintiff. The defendant pleaded the enjoyment as of right of a mixen for twenty years on his land near the plaintiff's house, whereby smells unavoidably arose from the mixen. Verdict for the defendant. But the plaintiff had judgment, non obstante veredicto. For "there is no claim of an easement, unless you make it appear that the offensive smells had been used for twenty years to go over the plaintiff's land. The plea may be completely proved without establishing that right. The nuisance may never have passed beyond the limits of the defendant's own land." 10 Ad. & El. 590, *Flight v. Thomas*.

(i) 15 M. & Wels. 237, *Ward v. Robins*.

(k) 5 C. B. 568. 17 Law J., C. P. 177. S. C. 5 Dowl. & L. 501, *Peter v. Daniel*. Post, p. 405.

amongst others. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and, indeed, under these rules, all matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit. Therefore, if there be a claim of damages for consequential injuries, there must be a special plea.(l)

By another rule, in any case in which a defendant shall plead \*the general issue, intending to give the special matter in evidence by virtue of any act of Parliament, he must insert in the margin of [\*402] the plea the words "by statute;" otherwise such plea will be taken not to have been pleaded by virtue of any act of Parliament; and such memorandum must be inserted in the margin of the issue and of the nisi prius record.(m)

Where the action was brought for erecting a cesspool and contaminating a well thereby, it was held, that "not guilty" would put in issue both these subjects of complaint.(n)

Within the new rules, again, it is not competent to plead a custom for owners to make trenches in lands for conveying water for the better work of a stannary, and another plea alleging the custom to be so to do upon making compensation for any injury done.(o)

The Court will not allow a special plea and not guilty by statute, although the plea raise a defence independent of the statute. It would be inconsistent with 4 Ann. c. 16, s. 4, to do so.(p)

The plea of not guilty merely puts in issue the fact of the diversion of the watercourse, but not the tortious character of the act; therefore, where, under such circumstances, the plaintiff merely proved that he had erected a grist mill upon the stream within twenty years, and so failed to shew his title to the water, the Court directed a verdict to be entered for him without damages. In this case also it is observable that the plaintiff in his declaration claimed the water as being owner of a mill, whereas, had he claimed as owner of the land, the evidence might have shewn a user of above twenty years, and although the learned Judge refused to nonsuit upon this, he would not permit an amendment so as to adapt the pleading to the proof. But Patteson, J., afterwards said, when the case came before the Court, that he should not have received evidence to shew that there was no mill, inasmuch as the plea admitted the existence of a mill. The learned Judge at the trial indorsed the facts

(l) 17 L. J., Q. B. 233, Clegg v. Dearden. S. C. 12 Q. B. 576.

(m) Reg. Gen. Q. B. C. P. and Exch. T. T. 1 Vict. 4 Bing. N. C. 816. 3 Nev. & P. 381. 4 Mees. & W. 3. 6 D. P. C. 649.

(n) 9 Mees. & W. 665, Norton v. Scolesfield. S. C. 1 Dowl. N. S. 638.

(o) 5 Ad. & El. 827. 1 Nev. & P. 242. 2 Moo. & R. 129, Bastard v. Smith. The defendant begins here, although the plaintiff avers his intention to recover real damages. 2 Moo. & R. 129.

(p) 11 Ad. & El. 631. 1 Gale & D. 72. 9 D. P. C. 1033, Ross v. Clifton.

upon the *postea* under 3 & 4 Wm. 4, c. 42, s. 24, in order that the  
 [\*403] \*Court might give such a judgment as they should see fit.(g)  
 The defendant, within twenty years after a company had possessed  
 themselves of a right to take water under an act of Parliament, sank a  
 well and used the water in a manner which the act did not prohibit.  
 On the contrary, the act had reserved to the inhabitants, occupiers, the  
 right to water for necessary uses, and for their cattle. The Court held  
 this defence available under not guilty and a plea denying the plaintiff's  
 right.(r)

But, secondly, we proceed to the pleadings in those cases where the  
 improper uses of the watercourse itself has occasioned the damage, as by  
 diverting it to the injury of another person's property, in which case the  
 aggrieved party has a full title to damages. And here we must refer  
 back to those decisions which have been cited in a previous page, for the  
 purpose of shewing the particular injury complained of, it being necessary  
 to adopt great strictness in describing the wrong, whatever it may be,  
 for which the action is brought. With respect to the *continuando*, it is  
 customary to allege it in actions on the case; but as trespass is one entire  
 act, it seems better to abstain from it in declarations of that sort. And  
 there is a case to justify this position. For upon executing a writ of  
 inquiry of damages in trespass for digging a hole in the plaintiff's soil,  
 whereby his land was overflowed, continuing the trespass for nine months,  
 it was insisted that evidence might be given of a consequential damage  
 after the nine months, as well as in the case of a nuisance which con-  
 tinues for nine months, where, the cause being removed, the effect never-  
 theless continues. But Holt, C. J., would not agree to this, observing,  
 that in the case of a nuisance, the damage was the gist of the action;  
 but that in trespass the tort was the material point, and he doubted  
 whether an action would lie for the continuance of a trespass as of a  
 nuisance.(s)

The same rules relating to declaring upon the possession, apply upon  
 these occasions, and upon the same principle, namely, that the defendant  
 is a wrong doer.(t)

In this last case, the plaintiff had brought an action on the case,  
 against the defendant, for causing water to flow through the pipes near  
 the foundation of the plaintiff's house, and for neglecting to repair them,  
 [\*404] by means of which the water flowed \*through, and sapped the  
 foundation of the house. After a verdict for the plaintiff, it was  
 objected that there was no allegation that the pipes in question were the  
 defendants, or that he laid them on the place where the injury occurred,  
 and that, therefore, it could not appear that he was either bound to repair

(g) 2 Ad. & El. 452, *Frankum v. Earl of Falmouth*. S. C. 4 Nev. & M. 330.

(r) 15 Law J., N. S. 315, *South Shields Waterworks Company v. Cookson*.

(s) 12 Mod. 519, *The case of the Farmers of Hampstead Water*.

(t) 2 Lord Raym. 1568, *Hoare v. Dickinson*.

them, or responsible for any consequences. But the Court disallowed the objections, and affirmed the judgment.(u)

The plaintiff declared in case for an obstruction. The defendant pleaded that the plaintiff's tenant ought to have repaired a wall, and that owing to the neglect of the tenant the wall fell into the watercourse, and that the defendant, within a reasonable time after notice, removed the obstruction. This plea was held bad for want of shewing an obligation upon the tenant to repair merely as *terre-tenant*.(v) And the defendant could not excuse himself by averring that he repaired as soon as he had notice of the injury, because he became liable at the time when the injury occurred. So if he had alleged that he repaired as soon as possible after the injury.(w)

It is a bad plea to allege that the plaintiff himself had abated the nuisance complained of, because damages may be recovered in respect of the past injury.(x)

The plaintiff sued certain commissioners of sewers for obstructing a watercourse where the plaintiff claimed a right of navigation. The defendant denied the right and the obstruction. Some attempts having in vain been made to refer the matter, which lasted four years, the commissioners desired to plead a third plea, which would go to defeat the action. But the Court refused this, unless the commissioners would renew their prior offer of compensation, and unless the plaintiff should refuse the compensation when tendered.(y)

Unity of possession need not be specially replied.(yy)

A replication to a plea, which stated a right to a certain watercourse, and a practice for twenty years to scour and widen a channel for the purpose of enjoying the said watercourse, traversing the right to the water as well as the right to scour \*and widen, was held [\*405] good upon special demurrer, and not bad for duplicity, because the quasi prescription in the plea was not severable.(z)

A replication to a plea alleging a general right to take sea-weed, that every subject had not, nor had the defendant that right, was held bad, because it traversed matter of law, or was argumentative and double, as tendering two issues of fact.(zz)

(u) 2 Lord Raym. 1568, *Hoare v. Dickinson*.

(v) If it had, whether the plea would have been good. *Quare?*

(w) 1 Q. B. Rep. 766, *Bell v. Twentyman*. S. C. 1 Gale & D. 223.

(x) 2 Mod. 253, *Kendrick v. Bartland*. S. C. 1 Freem. 230.

(y) 6 Bing. N. C. 442, *Mealey v. Pritchard*. S. C. 8 Sc. 684.

(yy) 2 Moo. & R. 244, *Clay v. Tharah*. S. C. 9 C. & P. 47. S. P. 4 M. & Wels. 496, *Only v. Gardiner*.

(z) 5 C. B. 568. 5 Dowl. & L. 501. 17 Law J., C. P. 177, *Peter v. Daniel*, ante, p. 401.

(zz) 1 Alc. & N. 348, *Howe v. Stowell*. But the plea was likewise held bad.

[\*406]

## \*CHAPTER XIII.

## OF EVIDENCE.

It is not necessary to say more, by way of preface to this Chapter, than that we propose to follow the same course of inquiry as in the last; that is to say, to detail the evidence necessary upon the trial of indictments, and then to mention those proofs which declarations and pleadings require, so far as they are connected with the subjects of this Treatise.

With respect to witnesses, however, the stat. 3 & 4 Wm. 4, c. 42, s. 26, ordained, that witnesses interested solely on account of the verdict should be admissible, provided, by sect. 27, that the name of the witness be indorsed on the back of the record. This statute was considered not to help a person called on the part of the plaintiff, who admitted on the voir dire, that she had been a joint owner in fee with the plaintiff of a house in respect of which a certain right to water was claimed. The indorsement of her name on the record would make no difference.(a)

So before the stat. 6 & 7 Vict. c. 85, certain borough freeholders, who claimed common of fishery, had agreed mutually to support each other in bearing the expenses of defending any prosecution against them for fishing in their common of fishery. It was held, that a commoner subscribing the agreement was a competent witness, the word "prosecution" meaning criminal proceedings only.(b)

But now by 6 & 7 Vict. c. 85, no witness is to be excluded from giving evidence on account of any incapacity either from crime or interest.

Wreck was claimed by grant and prescription. The answer of certain tenants of a manor, stating that the lord was entitled \*to wreck, [\*407] was held inadmissible as evidence, for although they might have been called jurors, they had no particular means of knowledge, and their declarations could, therefore, have no more weight than those of other persons.(c)

The jury cannot infer custom and prescription from the same evidence.(d) Enjoyment of a profit à prendre by the owners and occupiers

(a) 8 C. & P. 570, *Steers v. Carwardine*.

(b) 4 Q. B. 419, *Rawlins v. Jenkins*. S. C. Dav. & M. 219.

(c) 1 Cr., M. & R. 495, *Talbot v. Lewis*.

(d) Ad. & El. 5 Nev. & M. 308, *Blewett v. Tregoning*. Whether a customary and prescriptive right may exist in respect of the same land, if each be proved by proper evidence. *Quære?*

of a particular estate during living memory, without any evidence of user or non-user at any antecedent period, is evidence of a prescription, but will not support the plea of a lost grant. To support such a plea, some evidence must be given tending to refer the commencement of the user to the period of the supposed grant.(e)

In indictments for obstructions of navigable rivers, the particular nuisance is set out; and issue being commonly joined upon not guilty, it becomes the duty of the prosecutor to prove the allegations which he has made. Upon proof that the mischief has been done upon a navigable river, and of the nuisance complained of, the defendant must give some reason for his acts; as, that he was employed in repairing the banks of the river, or cleansing the stream, &c. In default of any evidence to counteract the prosecutor's proof, the defendant will, of course, be convicted.

Very slight testimony will suffice to shew the general user of the great rivers; and with respect to the Thames, Mr. Justice Chapple observed, upon one occasion, that the Court would take notice of that river.(f) More particular evidence certainly becomes necessary when the user has been less frequent; but as the public right in rivers will be further considered when we come to speak of the proof necessary to establish pleas of that nature, and as the testimony is the same upon both occasions, the consideration of it shall be postponed a little, for the sake of brevity.

It was said in one case, by Holt, C. J., that any thing which aggravated the fact of the obstruction might be given in evidence, although not directly to the issue, as, the taking of money to let people pass, which was the complaint then before him. It had been excepted to a witness in the same case, that he had contributed to carry on the suit, and that the public nuisance affected him also as a private nuisance; but the Chief Justice said, that these objections could not prevail against his competency.(g) [\*408]

Trespass was brought for an interference with the sea beach. The *l. i. q.* was described as part of the beach lying between high and low water mark. The abutments were set out as being landwards towards the north, or by sides particularly mentioned. But it appeared that these abutments were not immediately contiguous to the *l. i. q.* There intervened a waste strip of shingle, no part of the sea beach. It was held, that the abutments were not proved.(h)

The observations which we have made respecting obstructions to navigation, apply in a great measure to the subject of evidence upon indictments for disturbing public fisheries.

(e) *Id. Ibid.*

(f) *Andr. 150.*

(g) 12 Mod. 615, *Rex v. Clark.*

(h) 1 Q. B. 439, *Webber v. Richards.* S. C. 1 Gale & D. 114.

The interruption cannot be created by taking the fish, because the privilege is general;(i) but wilful obstructions may be raised, or damage committed to the prejudice of parties who are exercising a lawful user of a public right: and in such a case, evidence similar to that required concerning hindrance to navigation, namely, evidence of the public fishery, and of the particular annoyance complained of in the indictment, should be tendered.

The offence of taking fish from private enclosed waters, is now punishable as a misdemeanor, under the Larceny Act, instead of a felony as formerly; and it is necessary to give such evidence as will as nearly as possible satisfy the words of the statute. The place where the offence has been committed must appear to have been a fishery adjoining or belonging to the dwelling-house of the owner of the water, or of some person having a right of fishery there. It therefore becomes proper to prove that the fishery in question corresponds with the description given by the act of Parliament, and that set out in the indictment; and such a taking should be shewn, either by actual or presumptive evidence, as would satisfy a jury, if the offence were felony. The fact of the defendant being found engaged in taking the fish without license, is, of course, the best proof which can be obtained, but any other testimony which would connect him with an unlawful seizure or possession of the fish, would be sufficient for the consideration of a jury.

Some slight evidence of non-consent by the owner should be given. But the owner himself need not be called: the absence \*of consent may be proved by his agent, or it may be inferred from circumstances.(k)

The taking of oysters is a larceny. In this case it is only needful to observe, that a felonious taking of the oysters must be shewn; that the property of the oyster bed from whence the fish have been taken must appear to be in the proprietor, or in some other person; and, moreover, as the statute designates the oyster bed as one sufficiently marked out or known as private property, it would be desirable to give in evidence the distinguishing marks of the bed mentioned in the indictment.(l)

In cases which call for a summary conviction before a magistrate, according to the provisions of the clause which forbids the illegal taking of fish, the private right of fishery should be established, together with the improper invasion of that right. The same kind of evidence presents itself when it is found necessary to punish persons angling without leave in the day time.

(i) Except at particular seasons, and then the offence of taking fish is specially regulated and punished under particular acts of Parliament.

(k) See *Moo. C. C. 354, R. v. Allen, &c.*, as to the necessity of calling the owner, overruling 2 Camp. 654, *R. v. Regen.*

(l) See *Archibold's Criminal Pleading and Evidence*, 2nd ed. p. 151.



tly, upon the trial of an indictment for breaking down the dam or of a fish pond, after proving the ownership of the property stated in the indictment, the proprietor must show that the defendant committed the act charged against him. And it is not necessary to adduce proof of express malice against the owner, since the very fact of pulling down the dam is sufficient to enable the Court and jury to draw an inference of malice, so as to satisfy the word "maliciously," as stated in the indictment. (m)

In respect to evidence upon indictments concerning the burning of a mill, it is, for the most part, similar to that adduced generally in cases of arson. The felonious mischief, and the property in the mill must be proved, and the situation of the mill must be shewn according to the description of it in the indictment; and then the prisoner's guilt must be ascertained by further testimony. Something, however, should be put forward to satisfy the jury that the burning has been wilful; mere accidental conflagration will not constitute this offence. Circumstantial evidence will, nevertheless, be sufficient for the above purpose. (n) Then, again, upon the trial of persons charged with riotously pulling down a mill, or beginning so to do, it should be proved, that the prisoner, with others, making altogether three at the least, were assembled in a riotous and tumultuous manner at the particular place mentioned in the indictment, and that they then did the act complained of, being either the perpetrators themselves, or procuring and abetting the deed. (o)

With regard to other offences on the subject of mills, it should seem, that a miller may be indicted for delivering bad corn in the room of good corn which he has received under the following circumstances, which must be proved on the record, and established by evidence. It must be proved, that the defendant has been in possession of an ancient mill, to which the neighbouring inhabitants, or tenants of a manor, or others, have, from time immemorial, been accustomed to resort for the purpose of having their corn ground, thus showing the defendant in possession of a mill, or one of that description. Having thus laid a foundation for the case, resting upon his responsibility, by giving such evidence as will satisfy the Court that the residents or tenants are compellable to use the mill, the offence, committed as it were, by means of a false token, is proved, namely the delivery of the good corn in the first instance, (which the defendant had to prove the parcels accurately), and the redelivery of an inferior kind of grain; or part of the same in an adulterated state. Such evidence would, probably, be available to procure a conviction for such an act of dishonesty. (p)

(m) See Farrington's case, 1 Burn's Justice, by Chetwynd, p. 418.

(n) See on this subject, Archbold, pp. 205, 206, &c.

(o) See Archbold, p. 216.

(p) See ante, pp. 173. 371. As to the evidence on a forcible entry. See Archbold, pp. 386—390.

The evidence applicable to indictments for obstructing public water-courses, seems to be nearly allied to that which we have already mentioned concerning navigation. The public user of the pond, or stream, whatever it may be, must be brought forward, and then the obstruction complained of, together with the fact that it was occasioned by the defendant.

Actions for obstructing a public right of passage over a river, it has been said, are not common, because a particular damage must be shewn to sustain such suits. If, however, such an injury be individually suffered, an action will undoubtedly lie. It is absolutely necessary to fix upon the proper person to be sued, and to show that either he, or some one for whose acts he is responsible, has occasioned the mischief; the public use of the river must be shewn; and, lastly, the peculiar damage which the plaintiff has sustained by reason of the obstruction.

A few observations may be aptly subjoined here on the evidence which is required to prove that a river is navigable, together with certain matters which may be alleged in answer to such proof.

[\*411] \*The flow and reflow of the sea is *prima facie* evidence that a river is navigable, and may be said to be strong evidence for that purpose.(q) And a general and uninterrupted user by the public, for some time, affords conclusive proof of the universal right. But although the flux and reflux establishes a fair ground of presumption, it is by no means conclusive, for the opposite party may have recourse to various defences in order to rebut this plausible proof. Thus, an action on the case was brought for obstructing the plaintiff's barges in Rainham Creek. An user with certain boats was shewn, and it was also found that parties of pleasure had been known to sail up the creek, and that boats had come with persons who had cut reeds along the banks of the creek. The defendants proved, that they had bought their premises for a large sum, which premises were conveyed to them by the description of Rainham Wharf and Creek, that the creek had not been navigable until it had been made so by the defendants' predecessors at considerable expense, and that they had received wharfage and tolls for navigating the creek from the owners of vessels frequenting the wharf which they had erected there, and also from the plaintiff himself. The jury found for the plaintiff. A new trial was then moved for, and although the Court refused to disturb the verdict, Lord Chief Justice Gibbs said, that the flowing of the tide, *though not absolutely inconsistent with a right of private property in the creek*, was strong *prima facie* evidence of a navigable river.(r) So that it clearly appears from hence, that an answer of exclusive property may be set up in opposition to the evidence of flux and reflux. And it was said again by Gibbs, C. J., in the case last mentioned, that the cutting of reeds was a very strong act indeed; and that should a person wish to protect his

(q) 5 Taunt. 705, *Miles v. Rose*. 1 Marsh. 313, S. C.

(r) *Id. Ibid.*

exclusive possession, he must keep up the evidence of his right by guarding it against intruders.<sup>(s)</sup> The defendant's counsel in this case raised another difficulty, namely, that the judgment would bind the right of the defendants for ever. But the Court, while they admitted that the judgment would be evidence, and strong evidence too, declared, that it would not be conclusive evidence, and that they had so determined it in a water-course cause thirty years since.<sup>(t)</sup> The losing party, however, would be bound to adduce better evidence in support of the right, or the judgment could not be considered less than conclusive.<sup>(u)</sup> And if a verdict were obtained by a defendant, he might plead it by way of estoppel, and so succeed absolutely.<sup>(v)</sup>

\*We have also seen, that an exclusive right of fishery may be prescribed for by an individual against the public. Usage is the [\*412] strongest evidence which can be adduced upon those occasions, whether it be relied on by the public, or by the individual. In the following case an ancient usage was presumed from the circumstance of an uninterrupted enjoyment, and it was, moreover, held to be elucidatory of the terms of a grant, which might, otherwise, have been doubtful without such an exercise of the privilege. An action of trespass was brought *quare clausum fregit*. Amongst other things, a public right of fishery was pleaded. It appeared, that the plaintiff was the proprietor of Brownsea Island, that those from whom he claimed had had a grant of wreck in 1154, from Henry II., which had been confirmed in the reign of Henry VIII. by *in-speximus*. At the extremity of the island is the Bay of St. Andrews, which at low water displays an expanse of mud, intersected by a kind of lake. There appeared to be about three or four feet of water in this lake at low tide, and about the same depth over the adjacent mud at high tide. About forty years since, an embankment had been constructed at a great expense across the chord of St. Andrew's Bay, with the view of reclaiming the mud. In doing this, the sea weed, mud, and gravel within the bank, had been frequently made use of. The bay was about a mile and a half from Poole, and in full view of the town; but no opposition was made to this undertaking. The bank was subsequently broken in upon by the sea at high tide, in consequence of a storm. The bay was, nevertheless, treated as exclusive property, no fisherman or other person being permitted to enter there without consent. Thus, assertion of property, and acquiescence in that claim, were proved; and it was further admitted, that this bay formed no part of the Harbour of Poole, and that vessels of burthen could not float there. The defendant's evidence was, that two grants had been made by the Crown of the locus in quo, for a limited number of years, which had expired; (the grantor in the latter case having covenanted to endeavour to reclaim and bring the ground into cultivation within seven years); moreover, that the place had been commonly fished on, and in defiance of the assertion of property. This evidence, however, not being satisfactorily established, the jury found for

(s) *Id.* 706. 1 Marsh. 315.  
(v) 2 B. & A. 668.

(t) 5 Taunt. 706.

(u) 1 Marsh. 315.

the plaintiff. The Court having heard the arguments in support of, and against a new trial, were of opinion that the verdict ought to stand. True it was, that the evidence of the plaintiff's assertion of right had been very strong, but still his supposed title might not have amounted to more than usurpation, if it had been shewn that the public had had the locus in quo before the making of the embankment forty years since. But the [\*413] modern usage of forty years was evidence from whence it \*might be presumed, that the same course had been pursued in earlier times, nothing having appeared to the contrary.(w) In this last case Mr. Justice Richardson quoted the evidences mentioned by Lord Hale as applicable to a right similar to the present, and observed, that most of them existed in favour of the then plaintiff. These were "constant and usual fetching of gravel and sea weed and sea sand, between the high water and low water marks, and licensing others so to do; inclosing an embanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand."(x)(y)

Upon a question concerning an alleged nuisance in Portsmouth Harbour, the defendants relied upon a title to the soil as derived from a grant by letters patent of King Charles I., for the purpose of reclaiming land from the sea. The purposes of the grant had not been fulfilled. In 1784, after notice from the Crown that the right of the defendants would be disputed they made the erections which were the subjects of the information. There was much contradictory evidence on the question of nuisance. But the Court of Exchequer decided that the nonuser of the defendants under this grant, precluded them from seeking to avail themselves of it at that late period, and a decree was made that the building should be abated.(z) The decision being appealed from, Lord Eldon declared, that there had been no sufficient possession on the part of the defendants, for the Crown had remained in possession for one hundred and fifty years, and thus a presumption arose against its own grant. Had [\*414] there been an adverse title for sixty years against the Crown, it would have been enough; but here no \*greater length of time

(w) 2 B. & B. 403, Chad, Bart. v. Tilsed.

(z) Hale de Port Maris, pt. 1, c. 6, p. 27, cited 2 B. & B. 409; and see Id. 667, Gray v. Bond.

(y) In an action of trespass for making an embankment, an engineer was allowed to show from his own experiments, the effects of natural causes upon that harbour, and also on others similarly situated, and also to give his opinion, that the removal of the embankment would not restore the harbour. (Phil. on Ev. 4th ed. p. 299, Folkes v. Chad. S. C. referred to by Buller, J., 4 T. R. 498, by the title of the Wells Harbour case. S. C. 3 Doug. 157). The evidence of usage must, however, it should seem, be confined to the particular place, for where evidence of acts of ownership by the proprietor of a navigation upon different parts of a bank adjoining to new channels, was admitted to shew his right to the soil of another bank, which was in dispute, three Judges were of opinion, that it was improperly received. (Abbott, C. J., doubting). The ground of their decision was, because no preliminary evidence had been adduced to shew that the whole line of the bank had ever been one property, belonging to one person, or held under one title, before the existence of the navigation. (1 B. & C. 205, Hollis v. Goldfinch. S. C. 2 D. & R. 316).

(z) 2 Anstr. 605, Attorney General v. Richards.

than nineteen or twenty years could be shown on that behalf. The decree was affirmed, on the ground of nonuser only.(a)

We have seen in a former Chapter, that the subject may traverse an inquisition in all cases where property is found in the Crown, but that a *prima facie* case must be made out by the individual for that purpose. The following evidence was held to establish such a case. The jury found that the land in question had in times past been covered by the sea, but that it had been for some years derelict; that the land had ever since been unoccupied, but that the herbage had been eaten by the cattle and sheep belonging to the different tenants or occupiers of land situate within the said sea mark, &c. This was the finding. Lord Gwydir, who applied to traverse the inquisition by petition, made an affidavit, declaring, that the lands in question were parcel of his manor, and that the tenants of the manor had for a great length of time enjoyed rights of common upon the lands. This, said the Vice Chancellor, was not only a *prima facie* title, but a title not expressly negatived by the finding of the jury. The land might formerly have been within the high and low water mark, and those under whom Lord Gwydir claimed might have acquired a title by grant from the Crown. It might have been recovered from the sea by gradual alluvion, and thus have become part of the manor, the Crown being only entitled to new land which has become derelict.(b)

Now that we have mentioned wreck, it may not be improper to insert a case here which occurred on that subject, and which established the principle so often contended for, and which is very consistent with reason and good sense, namely, that usage is the best evidence to rely upon before a jury. In *trover* for a sloop, the plaintiff claimed, by prescription, all wreck of the sea thrown upon his manor, and shewed, that the lords of the manor had taken and enjoyed wreck thrown there, since 1668, until the time of bringing the action, being ninety-two years. The defendant claimed, on behalf of the Duke of Norfolk, all wreck within the rape, barony, or honour of Bramber, in Sussex, and it was found, that the plaintiff's manor lay within that rape, &c. The defendant also produced records, by which it appeared, that wreck had been claimed in Eyre in former times, in respect, amongst others, of the plaintiff's manor, and that those claims had been disallowed. A judgment in trespass also, four hundred years back, was produced, in which the defendants appeared to \*have been found guilty of taking and carrying away divers [\*415] quantities of goods cast by the sea upon the land at several places, amongst which the plaintiff's manor was mentioned. It was then urged for the defendant, that these three records established this point, that the plaintiff's usage must have commenced subsequently to the reign of Rich. I., and so within time of memory, and thus his supposed prescription fell to the ground as a necessary result. But Mr. Justice Wilmot, who tried the cause, considered that these records were not conclusive, but only

(a) 1 Dow. 316, *Parmeter v. The Attorney General*.

(b) 4 Madd. 281, *Ex parte Lord Gwydir and another*.

evidence for the jury; and damages to the amount of 50*l.* were awarded to the plaintiff. And the rule for a new trial was afterwards discharged, some of the Judges doubting whether the records were evidence in any way, but all agreeing, that the usage proved for the plaintiff, was much the stronger proof; and judgment was accordingly given for the plaintiff.(c)

In order to support a prescriptive title to wreck, it was proposed to use parol evidence. But it appeared that the *l. i. q.* where the wreck was claimed had been in the Crown as lately as in the time of Charles I., and hence the Court said that a jury could not infer that it was in them under whom the party claimed within time of memory.(d)

In an action brought some years since for firing at wild fowl on an open creek, so as to disturb the plaintiff's decoy, the following evidence was given. First the plaintiff's right to the decoy was proved, and it appeared, probably on the cross-examination, that the defendant made a livelihood by shooting at wild fowl on the water, and that he had a license from the Admiralty, for fishing and coasting along the shores of Essex. The decoy was situated on one of the salt creeks of that county, called the Blackwater River, and the tide ebbed and flowed there. The disturbance made by the defendant was then proved, and it was shewn, that he had fired so as to occasion the flight of several of the fowl from the decoy, but it did not appear that he had fired into the decoy. This evidence having been left to the jury as proof of a wilful disturbance of the plaintiff's decoy, and the jury having found for the plaintiff, the Court held, that the course pursued by the Judge in that respect was proper, and they refused a rule to set aside the verdict.(e)

[\*416] Having now mentioned the evidence necessary in actions for \*obstructing navigation, and also the ordinary proof requisite to shew a public right in navigable rivers, which led us to wander, as it were, for a moment, and to glance at private rights, as prescriptions to exclude the King's subjects from particular parts of rivers, wrecks, and decoy ponds, we will now return, for a short time, to evidence of the same nature with that at the commencement of the Chapter.

First, as to the recovery of port duties.

Here, in an avowry justifying the taking of goods, it is proper to prove the custom to repair the port, and then to shew that something (such as a toll of so much per chaldron for coals)(f) has been taken in respect of the repairs; and afterwards to connect the plaintiff in replevin

(c) 2 Wils. 28, Biddulph, Esq. v. Ather.

(d) 2 M. & P. 625, Alcock v. Cooke. The duchy of Lancaster seal has the same incidents as a grant from the Crown, S. C.

(e) 11 East, 571, Carrington v. Taylor.

(f) 1 Lord Raym. 384.

with the transaction, by bringing witnesses to state the circumstances under which the liability arose which occasioned the making of the distress. But it need not be shewn that the port is in repair, because the consideration is not the actual repairing, but the obligation to keep up the port for the public convenience.(g)

And it is further observable, that the port itself implies a consideration, although it is of course necessary to shew the duty which is claimed, in order to adduce the further testimony of an omission or refusal to pay it.(h)

The same rules will, it seems, apply to the case of assumpsit for the non-payment of these dues.

If the jury find a toll to be unreasonable, the plaintiff cannot have a verdict for a less amount which the jury may find to be reasonable.(i)

The evidence in actions for calls upon navigation shares being the same as in other actions respecting calls in general, it does not belong to this Treatise to enter into that subject more particularly. But it is desirable, nevertheless, to mention a case in which the register book of the Bristol Canal Company was held to be admissible. The action was debt to recover from the defendant, as one of the proprietors of the Bristol and Taunton Navigation, 270*l.* in respect of twenty-seven shares in that navigation, for a call made, at the rate of 10*l.* per share. The act of Parliament incorporating the company was produced, \*and the defendant's name appeared in it as one of the original proprietors. [\*417] His name also appeared upon the register book as the proprietor of twenty-seven shares. The book was made up by the treasurer, and the corporation seal affixed to it; but the original paper, subscribed by the defendant himself, was not admitted in evidence for want of a stamp. Lord Ellenborough thought that the plaintiff might recover in respect of one share, because the defendant's name appeared in the act of Parliament; but he doubted whether the register book could be given in evidence to shew the further property in twenty-six shares; and a verdict was taken for the plaintiff for 10*l.* only, with leave to move to enter it for 270*l.* The rule being accordingly obtained, and cause shewn against it, the act of Parliament was referred to. By the 100th section,(k) it was provided, that on the trial of any action against the owners of shares in the canal, it should only be necessary to prove that the defendant, at the time of making the call, was a proprietor of the share; and that the call was in fact made, and that due notice according to the act was given. The section went on to declare, that the production by the principal clerk, or

(g) *Id.* 385, per Holt, C. J.

(h) See also upon this subject of Evidence, 11 Cl. & F. 590, *Stockton and Darlington Railway Company v. Barrett*. S. O. 7 Man. & Gr. 870. 8 Sc. N. R. 641.

(i) 4 Q. B. 543, *Brune v. Thompson*. S. C. Dav. & M. 221.

(k) 51 G. 3, c. 60. (local act).

other officer of the company, of the register book, and of the minutes of the proceedings of the committee of management, &c., should be sufficient evidence. Lord Ellenborough then said, that it was clear that the register book ought to have been admitted as evidence of the defendant's property in the shares, and the rule to increase the verdict was made absolute.<sup>(l)</sup>

No proof can be more satisfactory to establish a public right of fishing, than an uninterrupted user by the people at large. And it should seem, that a *prima facie* case of public fishery would be made out, by shewing the locus in quo to be a navigable river, where the tide flows and reflows. Thus, by Hale, C. J., "In case of a river that flows and reflows, and is an arm of the sea, there *prima facie* it (the fishing) is common to all; and if any will appropriate a privilege to himself, the proof lieth on his side."<sup>(m)</sup>

The evidence, therefore, which would be commonly adduced upon such occasions would mainly come from the plaintiff. The plaintiff brings his action of trespass, the defendant justifies by virtue of a public right, and then the plaintiff sets out his title by prescription, or otherwise to an [\*418] exclusive privilege. \*This right to exclude the public he accordingly proves, by bringing forward as many witnesses as possible to testify the assertion of his right, and the resistance which he has always made to the public user.

Now that we are upon the subject of public fisheries, it will be recollected, that bounties to certain ships returning to England with the greatest quantity of oil and head matter, have been mentioned. One of the conditions which gave a title to the bounties was, that the vessel should carry an apprentice for every fifty tons, that he should be on board at the fitting, cleaning, and sailing of the ship, and should continue during the voyage, unless in the case of desertion, the fulfilment of the condition to be verified on the oath of the master, mate, and two of the mariners.

The plaintiffs sued the Commissioners of the Customs for bounties. To shew the compliance of the owners with the above requisitions, the muster-roll of the vessel, at the time of clearing, and at her return, were put in. In these the number of five apprentices appeared, the ship carrying two hundred and ninety-five tons; and at the return, one was marked "dead," and another "deserted." The muster-rolls were duly verified.

It was objected, that this evidence was insufficient, because a considerable interval might have elapsed between the clearing of the vessel and

(l) 1 M. & S. 569, *The Bristol and Taunton Navigation Canal Company v. Amos*.

(m) 1 Mod. 105, Lord Fitzwalter's case.



her sailing, and the apprentices might have died or deserted during that space of time. To this, however, it was answered, that the affidavit was prepared by the officer of the Customs at the port from whence the vessel sailed, and where she arrived; and that it was not competent for the defendants to object to an informality, arising from one of their own officers. Lord Kenyon upon this ruled the evidence to be sufficient, and that it would satisfy the act of Parliament. There was a fair inference, that the vessel had carried out the proper number of apprentices, and he would not presume the death or desertion alluded to between the time of the ship's clearing and sailing. The plaintiffs recovered a verdict.<sup>(n)</sup>

We have already seen, that there are four kinds of private fisheries, namely, a several fishery, a free, a common of fishery, and a fishery in gross. Respecting the evidence necessary to shew the existence of a several fishery, it has been frequently \*said, that the ownership of the soil is evidence prima facie of a right to this exclusive enjoyment.<sup>(o)</sup> Supposing that the defendant should plead *liberum tenementum* to a declaration for disturbing such a fishery, which has been held to be a good answer, the plaintiff would, probably, join issue, and the ownership of the soil would be then the chief matter in dispute. However, if the plaintiff have only one count in his declaration, and that a count for a several fishery, a circumstance extremely unlikely, and he were to reply specially to the defendant's plea of *liberum tenementum*, that he, the plaintiff, had an exclusive right in the *locus in quo*, and it were to appear, either on the record or in evidence, that the right was claimed independently of the soil, the difficult and perplexed question how far a several fishery could be said to exist without the soil, would arise. Counts for a free and a common of fishery are usually introduced, and thus the mischief is evaded.

The title to a free fishery, by which we generally understand that the soil is in another person, and that the grantee or grantees of the fishery enjoy the privilege in common with the grantor, is proved by shewing an user from time immemorial, or a grant. The prescriptive right thus established, induces the presumption of a grant, and the deed is evidence of itself to manifest the intention of the maker of it.

A common of fishery, like to other commons, is shewn by the testimony of old witnesses, who can speak to the taking of the profits of the waste by the commoners, as far back as the time of living memory. It is to be presumed, unless the contrary should appear, that the fish have been consumed by the commoner at his own home, or that they have been used according to the custom of the manor; and, indeed, evidence to the contrary of this would not be available to defeat the commoner's action, however it might affect him upon another occasion. If the claim

(n) 1 Esp. 246, *Lacon and others v. Hooper*.

(o) See 1 Mod. 105, *Stark. on Ev. pt. 4, p. 16*

be for a common of piscary in gross, the deed must, of course, be produced; and some evidence of user should be brought forward, in order to preclude the possibility of presuming a surrender of the grant, if it be very old.

In a case of fishery, a document produced from the Duchy Office of Lancaster, purporting to be a survey of the manor in 83 Eliz. by the deputy surveyor of the duchy, and whilst the manor belonged to the duchy, was rejected, whether as reputation, or made under public authority, although the survey had been founded on the presentment of the tenants of the manor \*at a Court of Survey, and Queen Elizabeth [420] beth had paid the expenses.(p)

It is easy to collect from the foregoing observations upon a common in gross, that if a right of this sort be claimed in gross, not being a commonable right, the deed confirming the title (and there must be a deed) should be produced. If the permission to fish be by grant, the better way seems to be to plead a license, and to give in evidence the leave thus obtained.

Lastly, should a deed be brought forward on any occasion in which the owner of the land may appear to have granted a fishery in his soil exclusively of himself and all others, but at the same time reserving the land, and this not by way of lease, but absolutely, it should seem, that the deed would be evidence of a grant of fishery in gross, notwithstanding the objections which have been raised against the existence of an exclusive fishery without the soil.

By analogy to the fact that it is not necessary to prove an actual taking of fish in order to support an action for disturbing a fishery,(q) it may be safely alleged, that the act of fishing is sufficient to shew an assertion of a right, without proof of the catching of any fish. The invasion of the right in possession, if overlooked becomes in time either strong evidence in favour of a wrong doer, or it operates to shew that the party thus intruded upon must have been indifferent on the subject of his rights.

In an action of trespass upon the plaintiff's oyster fishery, the defendant pleaded, 1, the general issue; then, 2, a public right of fishery, and the plaintiff replied a prescription to have the sole, several, and exclusive liberty to take oysters upon the said fishery. The plaintiff put in an inquisitio post mortem, and other documents from the Tower, to shew the antiquity of his fishery, and also that it had been parcel of the manor of B. He also gave in evidence three judgments in trespass, and then offered licenses appearing on the Court rolls, and bearing date from 1661 downwards, till the end of the 17th century, whereby the lords of the

(p) 7 Ad. & El. 617, *Evans v. Taylor*. S. C. 3 Nev. & P. 174.

(q) 1 Wms. Saund. 346 (b), *Patrick v. Greenway*.

manor had, in consideration of certain rents, granted the liberty of fishing and dredging for oysters. It was objected by the defendant's counsel, the payment of these rents, ought to be shewn in addition, either by the bailiff's account or otherwise; but Mr. Justice Heath declared, that he could not distinguish these licenses from old leases, which were \*always received in evidence in favour of persons claiming under the lessors. And the learned Judge thought, also, that payment [\*421] must be presumed under licenses of so ancient a date, for that it could not be reasonable to suppose that evidence of such payment had been preserved. However, the learned Judge added that to give any weight to these licenses, payments made in latter times, under licenses of the same kind, must be shewn, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in. A regular set of leases, or agreements for leases, of the oyster fishery, were then produced, and it appeared that rent had been paid under these for forty years past. Evidence was likewise adduced to shew that strangers when they approached within the limits of the fishery, had always been driven off by a watchman stationed for the purpose.(a)

The following evidence successfully given on behalf of the defendant, upon an information against the farmer of Lord Barclay, for attempting to exclude the Crown from about three hundred acres of derelict land in Gloucestershire. The plea was not guilty, and the defendant proposed to prove, that the lords of the manors adjacent to the Severn, particularly those of the Barclay Manor, (to which it was contended this derelict land appertained), had been accustomed to claim all royal fish taken within the river opposite to their manor usque flum aquæ; that these lords had the sole right of salmon fishing; that they had all wrecks cast between high and low water mark; that the lands of the adjacent manors had ancient rocks or fishing places, and wears, within the channel; that they had from time to time granted these fishing places, some by lease, some by copy of Court roll, by the names of rocks, &c., and had received rents for the same; that the manors on either side of the Severn were bounded one against another by the flum aquæ, according to common tradition and reputation; and lastly, that the increases, happening by the reliction of the river, were constantly enjoyed by the lords adjacent.

Before, however, the half of this evidence had been elicited, the defendant was urged by the Court and the King's Attorney General to withdraw a juror, the title to the land in question appearing so clear on the defendant's side. This, after some reluctance, was done accordingly, and the issue was acquiesced in by the Crown for ever afterwards.(s)

In cases of suits or services due by inhabitants and other \*persons to mills, the plaintiff proves his possession of the corn mill, [\*422] if it be not admitted, and then gives evidence of the custom, according to the particular facts, which obliges certain persons to grind their corn at

(r) 1 Campb. 309, Rogers v. Allen.  
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(s) Hale de Jure Maris, p. 35.

his mill, and he then shews that the defendant is one of the parties under the obligation, and concludes by proving the breach of the custom on the part of the defendant.(t) The following evidence was adduced in *Cort v. Birkbeck*:(u) 1. The proceedings in a suit in the Exchequer in which the then occupier of the mill was the plaintiff, and certain tenants and residents of the manor defendants, and in which the jury found for the custom. 2. The record of the verdict whereby the jury found the custom in the words of the issue. 3. A subsequent decree of the Court of Exchequer confirming and continuing the custom. 4. Proceedings in *scire facias* to revive the decree against some of the then inhabitants. The breach was then proved. This custom was demurred to, but the Court were of opinion that it was sufficient to maintain the issue. For here the proceedings in the Exchequer were evidence to prove the custom, and there was, moreover, testimony to shew that the defendant had used flour not ground at the plaintiff's mills. The issue was, therefore, fully proved.(v) Long usage and acquiescence in one uniform payment is cogent evidence of the reasonableness of a toll for grinding at a mill.(w)

Trespass was brought for breaking flood gates. There was a justification by the defendant as lessee of a mill under the Bishop of W. Old leases of the mill granted by a Bishop of W. were put in, and it was proposed to put in an old map of the place in question from the same custody; but it was rejected. The only case where a map of the property is receivable, is where it is not disputed that at the time when it was made the property belonged to a person from whom both parties derive their claim.(x)

Evidence of what a former tenant has said as to a request of permission to use the water of a mill, is admissible.(y)

A lease of land, and letters written by the defendant whilst he was lessee of a mill, were held receivable to shew unity of possession of the land and mill.(z)

[\*423] \*An old map of the parish belonging to the lord of the manor, was rejected by the Judge in a tithe cause in Equity, the right in question being a private right.(a)

The evidence needful to be brought forward on trials for the disturbance of watercourses, differs but little whether the facts to be established consist of injuries to mill streams, or to any other species of watercourse.

(t) See 2 Wms. Saund. 113 (a). Willes, 657. (u) Dougl. 218.

(v) See Dougl. 219, 223; but see 2 B. & C. 827, *Richardson v. Walker*, where this case of *Cort v. Birkbeck* was very much observed upon.

(w) 6 M. & S. 69, *Gard v. Callard*. This was a malt mill.

(z) 7 C. & P. 479, *Wakemen v. West*. Id. 481, *Doe d. Hughes v. Lukin*.

(y) 8 C. & P. 105, *Wakeman v. West*.

(z) 2 Moo. & R. 244, *Clay v. Thackrah*. 9 C. & P. 47.

(a) 5 Sim. 243, *Newcome v. Matthew*.

To shew the plaintiff's possession of the mill to which the water is appurtenant, or of the close over which it runs, and then to detail accurately the injury sustained, as nearly as may be possible in the terms of the declaration, together with proof of the defendant's misconduct, seem to be the main points of testimony in matters of this nature.

The necessity of developing in a very accurate manner the mischief done, has been fully proved in the Chapter upon Pleading; and it is an invariable principle, that if the proof differ materially from the allegations in the pleading, such a discrepancy will be fatal. Thus in two cases which have been already cited, the damage stated in the declaration did not tally with that proved at the trial. Upon the one occasion, the defendant was charged with placing and continuing a heap of earth so as to prevent the open water from flowing away into a ditch at the back of his house. The evidence was, that the heap was not originally so placed, but that earth fell in process of time from the heap into the ditch, and thus obstructed the passage. This was a fatal variance.<sup>(b)</sup> So, again, we have seen, that where the charge was for diverting and turning water, and the evidence disclosed the penning back and checking of it, the difference was such as to cause the plaintiff to be nonsuited.<sup>(c)</sup> And although it was more recently held, that an allegation of the diversion of water was sufficiently sustained by proof of the defendant having cut down a dam so as to hinder the plaintiff from the enjoyment of his regular and accustomed supply, the stream not being in fact diverted,<sup>(d)</sup> yet it is highly dangerous to venture upon such experiments; and the wiser course is to ascertain the real damage so as to state it clearly in the declaration, and establish it as laid, at the trial.

And, further, it is not sufficient merely to shew that the defendant has done some act which he has not been warranted \*in doing, the plaintiff must satisfy the jury that he has sustained some injury. [\*424] So that where it was shewn, that the defendant had erected a dam higher up the stream than the water enjoyed by the plaintiff, but it appeared also, that the plaintiff had not been injured according to the grievance stated in the declaration, the Court held the defendant entitled to a verdict, for the flowing water was publici juris, and the party complaining had neglected to shew that he was prevented from having water which he had acquired a right to use for some beneficial purpose. And the circumstance of the finding of the jury that the defendant had no right to stop the water in the summer was considered to make no difference.<sup>(e)</sup> In answer to the action for disturbing the plaintiff's watercourse, an adverse possession of water at a given level, or used in a particular manner, may be shewn, but then it must be in most cases the exercise of an adverse right for twenty years. So that an enjoyment of this for nineteen years, to the prejudice of a person whose land lay lower down the stream,

(b) 5 Taunt. 534, *Fitzsimons v. Inglis*.

(c) 6 Price, 1, *Griffiths v. Marson*. See Carth. 118.

(d) 7 Moore, 345, *Shears v. Wood*.

(e) 2 B. & C. 910, *Williams v. Morland*.

was held insufficient.(f) However, Lord Ellenborough gave it as his opinion, in the great case of *Bealey v. Shaw*, that less than twenty years' enjoyment might or might not afford a presumption of a right, according as it might be attended with circumstances to support or rebut the right.(g) So that an acquiescence in a certain mode of using a stream might, perhaps, be left to the jury as evidence of right, although the possession should have been for a time rather less than twenty years; and if so, the ruling of Mr. Sergeant Adair in *Prescott v. Phillips* would be shaken. Evidence that the plaintiff had erected a new wheel within twenty years, requiring less water than the old wheel, would not avail in an action for obstructing the watercourse, although the mill to which the water ran was not called an ancient mill in the declaration.(h)

In arranging evidence in cases of this nature, it seems important to attend to the following distinctions, which will seem also to illustrate the point of adverse possession above mentioned. If a person enter upon the enjoyment of unappropriated water, and a stranger interfere with him, he may maintain his action immediately against the party thus intruding upon his right; but if at the time of his taking the beneficial possession of this water, another landowner higher up the stream, have been accustomed for twenty years to divert part of the channel, or to use the water [425] in any particular way, the \*new comer cannot then sue his neighbour, who has so long reposed in the undisturbed and uninterrupted user of his share of the stream. While, again, if upon the arrival of this new comer, the neighbouring landowner commence a different system of working his mill, or begin to use the river in an unaccustomed manner, this change, if acquiesced in for twenty years, or, perhaps, somewhat less, will be binding on him who is lower down, since it must be either gross neglect which has permitted a damage to continue so long, or the presumption naturally arises, that no injury at all has taken place. This supineness, however, is not of frequent occurrence, for the ordinary feeling upon any unusual diversion of a stream is one rather of extreme jealousy, than of indifference.

Upon not guilty or not possessed, &c., a very slight amount of damage will suffice to retain the plaintiff's verdict.

The loss of five per cent. of water by evaporation, in consequence of a diversion will be sufficient. So the pollution of the water by soap-suds, however small the inconvenience, will be sufficient upon not guilty.(i)

It has been said, that mutual benefit is evidence of an agreement; so that, if two persons have property near a river, and each have land between the property of both and the river, and then each of them cut through the other's ground for water, according to the opinion of Lord

(f) 6 East, 212, *Prescott v. Phillips*, cited there.

(g) *Id.* 215.

(h) 1 B. & A. 257, *Saunders v. Newman*.

(i) 18 L. J., *Exch.* 305, *Wood and others v. Waud and another*. S. C. 3 *Exch.* 748, ante, p. 270.

Cowper, if such an easement were acquiesced in for twenty years, an agreement might be presumed.<sup>(k)</sup>

The following evidence was held admissible in an action by the plaintiff against the defendant, in which the plaintiff claimed the whole of the bed of a river running between his land and that of the defendant, the defendant claiming *ad medium filum*.

1. Evidence of acts of ownership exercised by the plaintiff lower down the stream where the river flowed between the land of the plaintiff and a farm of C., adjoining the land of the defendant.

2. Repairs done by the plaintiff to a fence which divided the farm of C. from the river, and which was in continuation of a fence dividing the defendant's land from the river.<sup>(l)</sup>

\*The defendant was the owner of a well. The plaintiff had enjoyed immemorially the use of such of the water of this well as [\*426] flowed into a pond. The defendant's predecessor had changed the course of this water, upon which the plaintiff made three new ponds, and ceased to use the old pond, which became overgrown. At length the defendant meddled with the new ponds, and the plaintiff then brought an action. His declaration stated, that at the time of the grievance, three closes of land and three ponds of water, one pond being upon each close, were in the possession of his tenant, and then the diversion of the water was alleged. The plaintiff in his evidence could not prove an overflow of the well water into the three ponds, but he was able to shew an immemorial right to the flow into the old pond, and the Court held that, under this declaration, he might produce *parol evidence*.<sup>(m)</sup>

The defendants resisted the plaintiff's complaint of obstruction to a watercourse belonging to his mill on the ground of an agreement made twenty-eight years before, by virtue of which the defendants would have been justified in their acts. This evidence having been given by the defendants, the Court held, nevertheless, that it should have been left to the jury to presume whether a grant had not been executed.<sup>(n)</sup>

A judgment recovered in another action against the defendant, is almost conclusive evidence. It is not, however, quite final, because the defendant might, possibly, be prepared with evidence of a different description, or of a stronger character, than in the former action, although in the latter case the defendant would, probably, be unsuccessful.

In an action against three defendants for obstructing a watercourse belonging to two mills in Rickmersworth, the record of a former trial, in

(k) *Gilb. Eq. Rep.* 4, by Lord Cowper, in *Lord Guernsey v. Rodbridges*.

(l) 2 *Mees. & W.* 326, *Jones v. Williams*.

(m) 14 *Mees. & W.* 789, *Hall v. Oldroyd*. S. C. 15 L. J., *Exch.* 4.

(n) 2 C. P. *Coop. Ch. Pr.* 329, *Dewhirst v. Wrigley*.

which a verdict had been given for the plaintiff, was produced. This evidence was opposed by the defendant's counsel, because the parties were not the same, the former action having been brought against the defendant B. and another defendant not on the record, whereas the present action was against him and others, who ought not to be prejudiced by a former verdict against B. only. Secondly, it was objected, that the record could not be admitted, because this was an action for an injury which had occurred since that for which the former action had been brought, and for which the plaintiff had recovered. Both these objections, however, were overruled. As to the first, Lord Ellenborough said, that the two defendants \*on this record had justified under the defendant B., [\*427] who was seised of the land, and, consequently, that a verdict, though against B. only, was admissible. As to the second, this was an action for the same obstruction, and the mode of stating it was nearly in the same words with the former. The verdict in the case tried before was not, indeed, a legal estoppel, so as to conclude the parties by its production; "but," added the learned Chief Justice, "it was so far binding, as that he should think himself bound to tell the jury to consider it as conclusive of the rights of the parties." The defendant's counsel then consented to remove the obstruction, and a verdict was taken for the plaintiff for nominal damages.(o)

The proper management of a verdict for the defendant is, if intended to operate in bar of another action, entirely different. Such a verdict is, indeed, an absolute bar; but it must be pleaded, in order to attain effect. "The very first thing I learnt in the study of the law," said Lord Tenterden, "was, that a judgment recovered must be pleaded." Therefore, where a defendant, in an action, for disturbing a watercourse, gave in evidence the record of a judgment between the same parties, and for the same cause of action, in which he obtained a verdict, the Court held, that although evidence to go to a jury, it could not operate by way of estoppel, because it had not been pleaded. The defendant, by merely pleading not guilty, had elected to submit his case to a jury.(p)

The circumstance of another party besides the plaintiff in a former action being in possession of certain canal works, was deemed abundant evidence to shew a priority of estate, so as to enable both to avail themselves of a judgment recovered by the sole plaintiff in the former suit. And it was held to make no difference that the second person had been examined as a witness for the plaintiff in the action.(q)

A person entitled to the use of a watercourse, concerning which a dispute has arisen, is not admissible as a witness. In an action of this kind, the plaintiff insisted that the usual course of the water was down the ditch, the *l. i. q.*, whilst the defendant contended, that the water had

(o) 5 Esp. 56, *Strutt v. Bovington*. See 5 Taunt. 705.

(p) 2 B. & A. 662, *Vooght v. Winch*. 3 East, 354. 364, *Evelyn v. Haynes*, cited.

(q) 2 Cr. M. & R. 133, *Blakemore v. Glamorganshire Canal Company*.



been immemorially accustomed to supply wells attached to certain cottages, one of which belonged to the defendant. To establish this fact, he proceeded to call one of the occupiers of those cottages. This person \*having acknowledged on the voir dire, that he considered himself entitled to the use of the stream in the same way as the de- [\*428] fendant claimed it, the evidence was resisted, and the case of commoners was put to the Court as a fair comparison. Mr. Justice Buller held the witness incompetent; for the question here was, to ascertain a general right claimed by all the persons occupying the cottages, and the record could be given in evidence on a future occasion of dispute concerning the course of the stream.(r)

In an action by a corporation against the defendants, for disturbing a watercourse, which had been granted to them by one A. B., one of the issues was, that the corporation was not known by the respective names mentioned in the fourth and fifth pleas. To support the pleas, a deed was produced in evidence to verify the correctness of the names as mentioned in them, and on a motion to set aside a nonsuit, Lord Ellenborough said, that the deed, as far as it went, was evidence to shew, at least against the parties claiming under the grantee, that the corporation was then known by the name by which they had granted the watercourse.(s)

Trespass was brought for destroying a dam and some flood-gates. The defendant pleaded, that he was possessed of a water mill and watercourse, and that he was entitled to the stream, and that the dam and flood gates which he had meddled with interrupted the flow of the stream to the mill, wherefore he cut them down. The replication traversed the right. The plaintiff claimed to begin. But the trespass being admitted, the defendant claimed to begin. Tindal, C. J. If the plaintiff goes for substantial damages, he is entitled, otherwise the defendant must begin. The case being brought before the Court of Queen's Bench, they held this ruling to be right. And by Patteson, J. : the rule was laid down by Alderson, B., that that party ought to begin against whom the verdict must be given, supposing there should be no evidence on either side.(t)

A cause for injuring the right to subterranean water was referred. The arbitrator found that the defendant did not commit the injury complained of, but directed him to remove the nuisance within a month. This finding was substantially in favour of the defendant, and entitled him to the expenses of all witnesses who could have been material under the general issue. \*This was before the new rules of pleading, [\*429] and the general issue only had been pleaded.(u)

But in an action for obstructing water, the expenses of taking three

(r) 2 Esp. 697, *Jebb v. Povey*.

(s) 8 East, 487, *Mayor, &c., of Carlisle v. Blamire* and another.

(t) 8 Q. B. 673. 15 L. J., Q. B. 225, *Chapman v. Rawson* and others.

(u) 2 Cr., M. & R. 258, *Radcliffe v. Hall*. S. C. 3 D. P. C. 802.

sets of levels, *before action brought*, were not allowed, and the rule for reviewing the taxation was refused.<sup>(v)</sup> There was a verdict for the plaintiff on not guilty without damages. There was a verdict for the defendant as to one of the issues, which went to the foundation of the cause of action. The general costs were awarded to the defendant.<sup>(w)</sup> There was an action for disturbing the right of taking water from a well. The issue traversed the right, and there was a verdict for the plaintiff, with nominal damages. The Judge certified that the damages were under 40s. But the Court held, that the plaintiff should have full costs, because such a right enjoyed by reason of the occupation of a dwelling-house is an interest in land.<sup>(x)</sup>

By 3 & 4 Vict. c. 24, s. 2, no costs are to be recovered by the plaintiff in any action upon the case, or of trespass, if the damages given by the jury are less than 40s., either upon issue tried or judgment by default, unless the Judge shall certify immediately afterwards upon the back of the record, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance in question, or that such trespass or grievance was wilful and malicious.<sup>(y)</sup> By sect. 4, this rule is not to apply where previous notice has been given not to trespass. Case was brought for diverting a watercourse. The action was referred. The costs to abide the award. Here there was no power to certify under 3 & 4 Vict. c. 24, s. 2. The arbitrator found for the plaintiff on all the issues, and assessed the damages at 6*d.* The Master allowed the plaintiff his full costs of suit, and this taxation was held correct: it was the meaning of the submission that the costs should abide the event.<sup>(z)</sup> The costs of plans required by the prothonotary for the information of the Court in an action for the disturbance of a watercourse were allowed on taxation.<sup>(a)</sup>

[\*430] \*When costs in an action for obstructing a watercourse are directed by an order of *nisi prius* to abide the event of an award concerning matters in the cause, it must be understood to be the events which can be decided by the event of the cause. So that where the arbitrator had not confined himself strictly to the matters in the cause, the Court, in confirming the order of reference, said it must be without costs, on account of the manifest injustice of making the costs of the

(*v*) 16 Mees. & W. 860, Ormerod and others v. Thompson and others. May v. Selby was referred to, where in an action for negligence upon a valuation between an ingoing and outgoing tenant, the costs of witnesses who went to the premises in order to qualify themselves for giving evidence, were disallowed. 4 M. & Gr. 142. 4 Sc. N. R. 727. 1 Dowl. N. S. 702.

(*w*) 4 D. P. C. 65, Frankum v. Earl of Falmouth.

(*x*) 5 Ad. & El. 377, Tyler v. Bennett.

(*y*) See *Id.* *Ibid.* Before the new act, where a right to take water was deemed to be an interest in land, so as to earn costs, notwithstanding the Judge's certificate under 43 Eliz.

(*z*) 4 Dowl. & L. 109, Griffiths v. Thomas.

(*a*) 2 Bing. 75, Holmes v. Holmes. S. C. 9 Moore, 158.

action abide the event of matters which could not be, and were not, decided in the cause.(b)

Where the Judge at the trial directs the jury in a case of conflicting testimony that one side, in his opinion, preponderates, the Court is not bound by the verdict; but if they see fit, a new trial will be granted. It was so decided in trespass for filling up a pond. It was also considered that the smallness of the damage made no difference, nor the novelty of the right as founded being upon an inclosure act.(c)

It was referred to an arbitrator to direct the future use of a stream of water, the property of which belonged to two persons. In performing his office, the arbitrator interfered with another stream, which was the exclusive water of one of these persons, and which, although it joined the first stream, was not a matter in difference. The Court held that the arbitration was just, the power of the arbitrator over the second stream being incidental to, and resulting from, his former direct and larger power.(d)

The arbitrator must confine himself to the present points of difference. He has no right to order that if the plaintiff should be dissatisfied with the cleansing directed to be done, the matter should be brought before his notice again. He cannot adjudicate upon the anticipation of future differences, which are beyond the scope of his authority. But the alleged directions may be rejected, and the rest retained so as to make his award good in part. The rule for setting aside such an award was, therefore, discharged.(e)

In the following case, in consequence of a water bailiff being sent for by the arbitrator, and examined, without notice to, and in the absence of the parties, two awards upon the same \*subject were declared [\*431] invalid. This arose upon an indictment for erecting a fixed pier in the Thames; and the defendants in the indictment brought their action in return against the prosecutor for disturbing their waterway. Both cases were left to arbitration. The arbitrator directed a verdict of guilty upon the indictment, and that the fixed pier should be removed. In the action he ordered a verdict to be entered for the defendants upon not guilty and other issues, and, as to the residue, for the plaintiff. Then, when the fixed pier should be removed according to the other award, the defendants were to place their barges according to certain specified regulations.(f)

(b) 5 Taunt. 454, *Alder v. Savill*. (c) 11 Price, 736, *Cooke v. Green*.

(d) M'Cl. 253, *Winter v. Lethbridge*. S. C. 13 Price, 533.

(e) 3 B. & Adol. 295, *Mansen v. Heaver*. S. P. 11 Ad. & El. 631, *Ross v. Clifton*, where the award was held bad. 9 D. P. C. 357, S. C.

(f) 6 Q. B. 637, *R. v. Sir v. Dobson and others*; *Sir R. Dobson and others v. Groves*.

# THE RIGHT OF THE CROWN

TO

## THE LAND BETWEEN HIGH AND LOW WATER MARK WITHIN THE REALM OF ENGLAND.

[See ante, pp. 23—28.]

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It seems to be a fair proposition that the ruling authority of a country ought to have the control of the seas in the neighbourhood of that country. Both private and public interests might be seriously involved, if the dominion of the sea within certain limits were not vested in the Sovereign. And this right of empire may properly be extended to tidal rivers, to which, however wise a policy it might have been in former times to have facilitated access, there were occasions when it was equally expedient to deny too free a passage. In early days, when perils of a formidable character menaced the realm at intervals when Parliament could not interfere so promptly as at present, it can scarcely be deemed otherwise than fortunate, that English Monarchs possessed so wide an authority over waters which led to the great highway of the world.

The same principle governs the imperial right over land between high and low water mark.

And, in all these cases, the soil, or bed, whether of tidal rivers, or of the sea, within certain limits, must be subject to the same prerogative. For it would have been highly inconvenient, independently of the right to the flow of water, if any power, irrespective of the Crown, could have put itself in action to meddle with the territorial possession of the ground over which the water had its flow and reflow.

These observations have reference to the sea within the limits of the royal prerogative, and to ordinary tides, whether high or neap, but they must not be understood as relating to any title which may have been ad-

vanced by the Crown to land covered by extraordinary flood tides. The latter deserve a separate inquiry and consideration.

\*This sovereignty on the part of the Crown has been acquiesced in for many centuries. Where disputes have arisen, the litigation appears to have been either between grantees of the Crown, or on the part of the King's officers or others complaining that the royal privileges have been improvidently exercised or fraudulently obtained. In the former case, the Crown has seldom thought it expedient to interfere, because whatever the title, the grant flowed in the first instance from the prerogative; in the latter, the discovery of imposition, or the inadequacy of consideration has been deemed of sufficient magnitude to warrant a procedure by those whose duty it was to protect the interest of the Sovereign. [\*484]

It is, indeed, a legal fiction to suppose that all the soil of the realm is vested in the King, as *pater patriæ*, but it is hardly so wide of the mark, as some suppose, to tender as a proposition, that the King was once in reality the master, both territorially and prerogatively, of the lands within his dominion.

The needy condition of the monarchs and the constant demand for money in early days, fortunately for the country, tempted them to disavow their possessions, and thus, in process of time, there remained but a small territory, which is now known by the term of Crown or demesne lands. So sensible were the possessors of real estate, of their condition, at the crisis when the institution of property became more certain and more regarded, that the statute 21 Jac. 1, c. 2, was passed for the purpose of barring the claim of the Crown after the lapse of sixty years. This act, indeed, gave way to one more efficient in the reign of Geo. III., but the principles of the royal prerogative, and the necessity of limiting its demand, were recognised at the period of the rise of English liberty. However agreeable it may be to the pride of the historian to explain away the original dominion of the Crown, it seems quite consistent with good sense to be satisfied with the existing order of things, under which, as far as the *prerogative* is concerned, every man's estate is placed within his free disposal.

The long and almost unbroken assent, which has been accorded to these supreme rights, has probably been the cause of the late attempt by the Crown to lay claim to a territory which *extraordinary* tides had overflowed. We will advert to this novel assumption by and by, but in the mean time we are enabled by a fair inference to understand the full force of the righteous acquiescence, which has for so great a period been yielded to the ordinary kingly prerogative, where the *ordinary* tides prevail.

The distinction between a territorial and a prerogative right is not difficult of explanation. The Crown may purchase lands, and thus a territorial right is obtained. The Crown may grant away lands, but may, at

the same time, reserve certain prerogative rights which are attached to the estate. And the Crown may retain its original property, and thus maintain unimpaired both the territorial and prerogative dominion. If any mistake were made at any time with reference to the words "territorial" and "prerogative," it would be for want of understanding that [\*435] these terms are united in the Crown, and can only be dissevered by the act of the Sovereign. A private \*person, and likewise the Crown by purchase, may have a territorial right independently of the prerogative, but the empire over the sea, as well as over rivers and their shores, between the high and low water mark, are absolute appendages to the chief authority in the real. And it would seem to be a very insufficient argument in reply, that the sea and navigable rivers might be encroached upon, if so large a right were conceded to royalty, inasmuch as the invasions of private persons might, and probably would be more frequent and more vexatious than any assumption on the part of the King. The protection and supervision of the state would be taken away, and the subjects, so far from being compensated for the encroachment, would exchange an established for a capricious master.

The meaning of lord is a person who retains the dominion or ultimate property of the feud or fee. And, although, it might be contended by some that the assumption of sovereignty by the Crown might be even of earlier date than the relation of lord and vassal, yet the Commons, in the reign of Henry V., understood the regal title in its fullest sense, when they prayed thus: "whereas the King and his progenitors always have been lords of the sea, and now it happened that the King is lord of the coasts on both sides of the sea, and, therefore pray the King to lay an imposition upon strangers passing over the sea." (a) "The sea is of the liegances of the King, as of the Crown of England." (b) It is his marine patrimony, part of his inheritance, and not as a thing of prerogative, (c) (d) by which observation of Walmesley, J., it is not to be understood, that no prerogative attaches, but that there is a union of both dominions.

The writ of *ad quod damnum*, necessary upon the occasion of diverting any public highway, may be reverted to as shewing the prerogative right. A defendant, in 12 Jac. 1, was fined 100*l.* for diverting part of the River Thames. Such a thing could not be done, it was adjudged, without an *ad quod damnum*. And it was added, that it ought also to be "*by patent of the King, for to do such a thing.*" (e) So it is if there be a stoppage of an ancient trench or ditch, by reason of the outrageousness of the sea; there must be an *ad quod damnum* before suit to the King to make a new trench, and to stop the ancient trench. For inquiry should be made as to what damage it would be to the King or others. (f)

(a) Rot. Parl. 8 H. 5, N. 6, cited in 16 Vin. Ab. 574, (B a), 1.

(b) Fitz. Protec. 46. 15 Vin. Ab. 576, pl. 18.

(c) 2 Leon. 158. Thos. Raym. 242, in *Attorney General v. Sir Edward Farmer*.

(d) That is of mere prerogative.

(e) Noy. Rep. 103, *Hind v. Manfield*.

(f) F. N. B. 225, E.

It will not, it is hoped, be an unthankful task to pause over this excellence of the prerogative. It may be any thing but displeasing to reflect upon the consistency of the cases upon the subject, and to observe the broad and plain distinction which has been recognised between claims of the subject derived originally from the Crown, and a denial of the very essence of the right itself. Read with this view, and without disuniting too far the rights of territory and the rights of prerogative, the law will be found clear, and unembarrassed by difficulty.

\*Every prerogative is said to contain in itself a prescription.<sup>(g)</sup> [\*436] So that the Sovereign is not limited merely to his *jura coronæ*, but he may likewise claim as a mixed person. And when we find statutes confirming certain rights, as royal fish, to him,<sup>(h)</sup> it is not to be supposed but that he was entitled to such fish at common law.<sup>(i)</sup> The Parliament only gave him a declaratory assent to that which existed before. The King is considered to be so absolutely seised, that no intruder can gain any estate or possession against him.<sup>(k)</sup> Nor can any one count against the King,<sup>(l)</sup> which means not that a writ of error will not lie for the subject, but, that in matters touching the royal inheritance, it is not competent to impugn the title of the lord of the soil. And with this agrees the common law, that no one can impeach the title of his seignior.

These allusions are made, not as conclusive of, scarcely even as bearing upon the question of maritime rights, but as shewing, by way of introduction, the acknowledged power of the Crown.

To proceed: no man may set up a common ferry for all passengers, without a prescription, time out of mind, or a charter from the King.<sup>(m)</sup> And Lord Hale adds, this holds place much more in a public river or arm of the sea.<sup>(n)</sup>

And again no man can suppress a ferry without a writ of *ad quod damnum*.<sup>(o)</sup> The King may have a port and toll without any consideration.<sup>(p)</sup>

The King has a prerogative in lighthouses, and he may erect them in the soil of a subject without the subject's consent.<sup>(q)</sup> And no one may build a lighthouse without authority.<sup>(r)</sup> So, although the rook may be parcel of the inheritance of another, the profits of the beaconage of the rock belong to the Admiralty.<sup>(s)</sup>

“Originally all wrecks were in the Crown, and the King has a right

(g) Plowd. 322.

(h) 17 Ed. 2, c. 11.

(i) Plowd. 315.

(k) Id. 546.

(l) Id. 241.

(m) Hale de Jure Maris, 6.

(n) Hale de Jure Maris, 7.

(o) 1 Salk. 12, *Payne v. Partridge*.

(p) Lutwy. 1523 (b).

(q) Bac. Ab. Prerog. B. (6).

(r) 3 Inst. 204. See 4 Inst. 148.

(s) 1 Sid. 158, *Crosse v. Diggs*. 2 Keb. 114, *Gibs v. Osbaston*. See 19 L. J., Canc. 267.

of way over any man's ground for his wreck, and the same privilege goes to the grantee thereof."(*t*)

Upon a conviction for deer stealing in Rockingham forest, it was objected, that it was necessary to shew in what capacity the King was seised of the forest, and a distinction was attempted between his natural and [437] political capacity. But by Holt, C. J., where the King \*is said generally to be seised, it shall be intended a seising *jure coronæ*. The conviction was affirmed.(*u*)

With these illustrations of the prerogative in our books, together with the knowledge that many others of a similar nature exist, we must not be surprised to find, as the King has royal privileges, upon occasions when he has not the right of soil, that a fortiori, he unites in several instances, the inheritance with the prerogative.

The primary right of fishing in the sea, creeks, and arms thereof, is acknowledged to be in the Crown.(*v*) The liberty of fishing in these waters is also conceded to the common people of England, as a public common of piscary.(*w*) And thus the principle holds, which was so familiar to ancient times, of lord and tenant. The soil abode in the seignior, but all rights profitable to the advancement of commerce and the general welfare, accrued, by degrees, to the subject. Under a monarchical, probably the most perfect form of government, this junction of rights seems not inappropriate, for it is far better to deal with a fountain head, represented by the Crown, than with a number of petty estates, represented by the people, where property in the soil would doubtless, tempt them to encroachments of an inconvenient, if not an oppressive character.

The commonalty of Grimsby impleaded the fishermen of Ole, within five miles of Grimsby, for lading and unlading their fish at Ole, contra prohibitionem regis. The defendants traversed their user of the shore after this manner, but admitted that they were accustomed fish with nets and boats, tanquam piscatores.(*x*) When the rights of public fishery became more established, we find that the admiral was prohibited from taking any money, &c., from fishermen for license to pass the realm upon their voyages.(*y*) This statute uses the words "Sovereign Lord," as as well as the King's Majesty. It is true that "our Sovereign Lord," is often used elsewhere upon other occasions than such as relate to lands, but still there are exceptions to its employment in the statutes of these times, and, therefore, it savours from its very nature, of the feudal prerogative. And as the lord of each side of the bed of a private river has the right of fishing, in right of his soil, ad medium filum aquæ, so the King seems to have his primary dominion of fishing as lord of the soil of the sea.

(*t*) 6 Mod. 149, Anon.

(*v*) Hale de Jure Maris, 11.

(*x*) Ibid. Mich. 19 E. 3.

(*u*) 7 Mod. 77, R. v. Smith.

(*w*) Ibid.

(*y*) 2 & 3 Ed. 6, c. 6.



A natural and just following out of these premises will bring us to acknowledge this sovereignty of soil beyond the main ocean. For the creeks and arms of the sea and tidal rivers are not the less parcels of the maritime empire because they are more confined; and although we approach nearer to the main land, the salt tide is, nevertheless, our companion, and, with much reason, demands our notice as being [\*438] \*subject to the same principles. Hence the shore or territory between what is called high and low water mark, must not be considered as the less covered with the sea because it is periodically affected by a reflow. And thus if the soil of the ocean resides with the Sovereign in respect of its being sea, the land between the two marks, would be supposed to be governed by a similar assumption of title. Nor is this surmise without authority.

It appears that the Prior of Tinmouth was an usurper of the soil between the high and low water mark. Whether the Crown would have thought it worth while to interfere, is not perhaps certain. But the town of Newcastle being a sufferer from the encroachment of this spiritual power, which by building upon the shore had damaged the trade of the town, petitioned the King to assert his rights. The Prior claimed the right of soil, but the King's Attorney replied, that several houses had been erected by the Prior upon the shore, which, inasmuch as it was comprehended within the flow and tide of the sea, belonged for that reason to the King. And judgment was given against the Prior, recognising the rights of soil in the King, although the houses do not seem to have been confiscated.(z) The Prior continued his usurpations, but the town persevered in their opposition, complaining of the intrusion in opposition to the former judgment. This judgment was, "*Quod dominus rex habebit totum portum à mari usque ad quandam locum vocat, &c.,*" which place comprised the soil.(a) So, if the sea marks are gone, so that it cannot be known that ever there was land there, the land gained from the sea belongs to the King.(b) So it seems to have been admitted, without controversy, that the land which is usually overflowed at ordinary tides may be claimed for the King.(c)

There were disputes occasionally between the Crown and the subject, as to the question whether certain lands had ever belonged to a private proprietor so as to be liable, upon the retirement of the sea, to resumption; but independently of that circumstance, the legal title seems to have been repeatedly confirmed. An information was laid against Sir John Constable for taking wreck without warrant, and the defence was, that the Crown had granted the manor, where the wreck was claimed, to Sir John. No decision appears to have been come to with respect to the

(z) Hale de Jure Maris, pt. 1, p. 13; pt. 2, pp. 80, 81.

(a) Hale de Jure Maris, pt. 2, p. 81.

(b) Trin. 43 E. 3. Rot. 13. Dy. 326 (b).

(c) Vanhaesdanke, by information against Mr. Whiting, 12 Car. 1. Sir Edward Heron's case, 15 Car. B. R. The Lady Wansford's Lessee and Stephens, 17 Car. 2, in Scacc. Hale de Jure Maris, p. 12.

shore, but it was distinctly held, that the King in this case should have his prerogative as King in all respects.<sup>(d)</sup> Some years afterwards, Sir Henry Constable brought trespass against one Gamble for interfering with his right of wreck granted to his father, Sir John Constable, and judgment was given against the plaintiff. But it was held in this case generally, that the sea is of the King's allegiance, and parcel of his Crown of England; that the soil between high and low water mark might be parcel of a manor of a subject; that between these marks the common law and the Admiral have *divisum imperium*; and that any claim to [\*439] royal fish, between the points where the sea ebbs and flows, must be by prescription, which presupposes a grant.<sup>(e)</sup>

It seems, that in more ancient days than the present, there were encroachments upon the King's prerogative. Some houses were built during the reigns, probably, of James I. and Charles I., between the "Hermitage Wharf and Dock Shore eastward, and between old wall of Wapping Wall on the north, and the River of Thames on the south." The soil and ground where these houses were built lay between the high and low water marks of the River Thames; and it was decreed in 8 Car. I., in the Exchequer, that this ground was parcel of the Port of London, and that the houses belonged to the King, and the same were "accordingly by commission seized into the King's hands."<sup>(f)</sup>

So where the Abbot of Abbotsbury was proved to have a game of swans, and likewise the bank and soil itself of the arm or creek of the sea there; as soon as the Abbot surrendered his franchise, not only the fishing and swans, but the soil likewise, came into the King's hands.<sup>(g)</sup>

Callis writes quite confidently upon the subject. "In case of the sea or royal river, the property of the banks and grounds adjoining are and belong to the subject, where lands do but and bound thereon; but the soil of the sea and royal rivers do belong to the King, as formerly in my Tractate of Rivers may appear."<sup>(h)</sup>

So Mr. Justice Bayley: "Prima facie, the lord of the manor is entitled up to high water mark; but between high and low water mark the right is *primâ facie* in the Crown, and the Crown has likewise the right of wreck."<sup>(i)</sup> And Mr. Justice Littledale. "The land between high and low water mark *primâ facie* belongs to the Crown."<sup>(j)</sup>

(d) 1 And. 86. 19 Eliz.

(e) 5 Rep. 106. 43 Eliz. Sir Henry Constable's case, 16 Vin. Ab. 576, pl. 12. Lasce's or Lacy's case, Tr. 25, El. Dav. Rep. 56. Royall Piscarie of the Banne.

(f) Hale de Jure Maris, p. 13.

(g) 7 Rep. 15, Case of Swans.

(h) Callis, 115.

(i) Hall on the Sea Shore, Appendix, Dickens v. Shaw. 4 B. & C. 495.

(j) 3 Man. & Ry. 329. To the same effect, Macdonald, C. B., 10 Price, 378. Richards, C. B., Id. 412. Parke, J. in Dickens v. Shaw, reported in Hall's Appendix.

So at Boston in Massachusetts, the Commonwealth, imitating the prerogative of the Crown, assumes all rights of the sea shore, and lays claim to the ownership of the soil between the points covered by ordinary tides.

So unvarying is this rule, that as soon as the sea abandons any portion of land, unless there be sea marks to shew that the land had formerly belonged to another owner, the right of the Crown immediately attaches, and title is made to the soil as derelict.<sup>(k)</sup> The reason of which is, because, in truth, the soil, where there is now dry land, was formerly part of the very fundus maris, and consequently \*belonged to the King.<sup>(l)</sup> "If the soil of the sea, while it is covered with water, [\*440] be the King's, it cannot become the subject's, because the water hath left it."<sup>(m)</sup> Where there is no visible owner, the Crown takes by virtue of its prerogative.<sup>(n)</sup>

The next point worthy of remark is, that a subject may have the soil between the high and low water marks, by a grant from the Crown. He may shew his grant, or claim, by prescription, which supposes the grant as in the case of the Earls of Devon at Toppesham. The Mayor and Burgess of Exeter made a vain attempt to disturb these lands in their possession, because the Earls had the property of the soil of the port by prescription.<sup>(o)</sup> The Abbott of Titchfend was proceeded against by the Burgesses of Southampton for establishing a weir contrary to the benefit of the navigation, and although it was allowed that the subject might have a prescriptive right to such a privilege, even *below* the low water marks, yet it was held, that this weir being *ad commune nocumentum*, must be suppressed.<sup>(p)</sup> So, in the Sutton Port case, about 14 Car., the parson of Sutton had a verdict for the tithes of Sutton Marsh, in Lincolnshire, as parcel of his parish. This place was within time of memory the mere shore of the sea covered at ordinary tides, and without the old sea bank.<sup>(q)</sup> And in this sense of establishing weirs either above or *below* low water mark must be understood the case of the Abbot of Hulme. The Abbot obtained a verdict not merely in respect of his fishing, but likewise for the soil, "*for he made weirs in it.*"<sup>(r)</sup> It made but little difference whether the King's prerogative or the rights of the Lord of the Manor came into question upon this occasion, because the fact of weirs being commonly put down upon the land *below* low water mark, which is indisputably the King's land, shews that the judgment "*quod abbas eat sine die*" must have proceeded on the ground of his having a prescription for his fishing or a presumption in favour of his title to the soil by grant. To this sense also we must refer a case cited by Mr. Sergeant Merewether in an argument before the Lord Chan-

<sup>(k)</sup> Callis on Sewers, 47.

<sup>(m)</sup> Id. p. 31.

<sup>(o)</sup> Hale de Jure Maris, 20, 55.

<sup>(q)</sup> Id. 27. Hall, p. 171. So also is Sir Henry Nevil's case, 5 E. 3, 3, cited in Hale de Jure Maris, p. 27.

<sup>(r)</sup> Hale de Jure Maris, 20.

<sup>(l)</sup> Hale de Jure Maris, p. 14.

<sup>(n)</sup> 2 Vent. 168.

<sup>(p)</sup> Id. 20.

cellor, as having been decided in Easter Term, 14 Edw. II. Some boats had been seized on the shore of the Thames damage feasant. And it was alleged, that there was no right to land without the leave of the lord, within the flux and reflux of the tide.<sup>(s)</sup> There appears to be no inconsistency in supposing that the right of soil here was in the lord of the manor, by grant from the King, for the subject may, beyond question, be invested with such a dominion. Lord Hale, in his *Treatise De Jure Maris*, employs a few short but expressive sentences to shew that the sea shore may be parcel of a manor. And it may not be unfair to draw the conclusion, that the privileges of which he speaks being in the first instance, the subject of grant, must have been derived from the one source [\*441] of all such grants the \*royal prerogative. "It [the shore] may not only be parcel of a manor, but, *de facto*, it many times is so; and perchance it is parcel also of all such manors as by prescription have royal fish or wrecks of the sea within their manor. For, for the most part, wrecks and royal fish are not, nor, indeed, cannot be well left above the high water mark, unless it be at such extraordinary tides as overflow the land: but these are perquisites, which happen between the high water and low water mark; for the sea, withdrawing at the ebb, leaves the wrecks upon the shore, and also those greater fish which come under the denomination of royal fish. He, therefore, that hath wreck of the sea or royal fish by prescription, *infra manerium*, it is a great presumption, that the shore is part of the manor, or otherwise he could not have them."<sup>(t)</sup> And herewith agree as the learned Judge remarks, Sir Henry Nevill's case, and the Register.<sup>(u)</sup>

The authorities present in this manner an unbroken chain of prerogative decisions. Even the case of *Johnson v. Barret*, if read with a sufficient regard to legal principles, resolves itself in to the same consideration; namely, that the land between high and low water mark might undoubtedly become private property, subject to the public convenience, but that the right emanated at first from the prerogative. Trespass was brought for carrying away soil and timber. It appeared that a quay had been erected at Yarmouth, and that the bailiff and burgesses, of that town had destroyed it. This case was argued in Easter Term, 22 Car. I; Rolle, then at the bar, said, that if the quay were erected between high and low water mark, then it belonged to him who had the land adjoining. But Hale, on the other side, did earnestly affirm the contrary; viz. that it belonged to the King of common right. But it was clearly agreed, that if it were erected beneath the low water mark, then it belonged to the King.<sup>(x)</sup> The case does not seem to have been decided. The times were disturbed, and the Judges of the bench uncertain. We are not in possession of the evidence upon which the counsel argued, and it probably occurred to them, that a quay below low water mark was more likely to be a nuisance than a weir, and, therefore, the less proba-

(s) Speech of Mr. Sergeant Merewether in the Court of Chancery, December 8, 1849, p. 21.

(t) Hale *de Jure Maris*, p. 27.

(x) *Al. 10, Johnson v. Barret and others.*

(u) *Id.* 27, 28.

ble to have been the subject of a royal grant. This want of a decision may be suggested as the reason why Lord Hale, in his book *De Jure Maris*, did not find himself at liberty to quote it as establishing either the one point or the other; and it is not improbable that so great a man as Lord Hale would not insist upon his argument as an advocate, in a Treatise which consists for the most part of solemn decisions.

The same law prevailed in the Duchy of Cornwall. The Earl of Cornwall had *wreccum maris per comitatum Cornubiæ*, and being questioned by the Crown for wreck, the judgment was, *quod eat sine die*. Lord Hale felt the force of this judgment in favour of the prerogative when he was proving the occasional right of the subject to the shore, and he, therefore, added, "but that was in a contest between the King and him; for probably the *inferior lords* might have it by *\*usage* against him."<sup>(y)</sup> The Earl of Cornwall must have received his grant [\*442] from the crown, of inevitable necessity, and the question was, whether, amongst other Cornish privileges, he had likewise had conferred upon him this wreck of the sea, which he might, in his turn, have handed over for a consideration to the lesser lords. It may be said, in a word, that the Duchy of Cornwall is peculiarly connected with the Crown.<sup>(z)</sup> And it is far easier, and, indeed, more proper to rely upon the certain evidence of a grant to a particular person, than to fall back upon the king's prerogative, when it is not necessary to take that step. So that where it appeared that the Castle and Manor of Trematon was vested in the King, it seemed more to the purpose to produce written evidences of the royal title from former Kings, than to rely upon a prerogative title, which might have been defeated by a defence of prescription or a presumed grant.<sup>(a)</sup> If the water, in this case, passed by "strength of its being parcel of and appendant to the manor,"<sup>(b)</sup> and not by any prerogative "right,"<sup>(c)</sup> it seems satisfactory to be able to reconcile any apparent inconsistency, by reflecting that is better, in all cases, to rely upon an appendancy to a manor or other property, which is certain, than to hazard the claim of prerogative, from which an antagonist grant may, very possibly, have emanated.

In another case, touching this Manor of Trematon, the information claimed for the King, in the right of the Crown of England, as the general right of the Crown, the ground and soil of the coasts and shores of the sea, and of any port, haven, &c., and particularly the ground and soil of Sutton Pool. This case was determined for the Crown, because the sea there belonged to the Duke of Cornwall, as part and parcel of the manor of Trematon.<sup>(d)</sup> The result is the confirmation of the reason

(y) Hale *de Jure Maris*, 28.

(z) See a Dissertation on the Rights to the Sea Shores, &c., by James Jerwood, Esq., 1850, Barrister-at-Law, p. 63.

(a) Hall on the Sea Shore, p. 179. See Mr. Jerwood's Diss. p. 61, et seq.

(b) Mr. Sergeant Mereweather's Speech, p. 37.

(c) Ibid. See Wightwick's Reports, 167, Attorney General of the Duchy of Cornwall v. Sir John St Aubyn, Bart.

(d) Speech of Mr. Sergeant Mereweather, p. 37.

above suggested of the superior advantage of direct evidence towards the establishment of a title over a defeasible claim of prerogative. For as to the general principle, it "has often been affirmed, and *never denied*, that the soil in all rivers, as high as the flux and reflux of the sea is in the King, and *not in the lords of manors*, without prescription."<sup>(e)</sup> The same doctrine was advanced and verified upon appeal to the House of Lords in the Attorney General v. Parmeter;<sup>(f)</sup> and again, in the Attorney General v. Burridge.<sup>(g)</sup>

The sea shore being absolutely settled in the Crown in the first instance, but granted to a subject for uses, returns back to the original grantor, where the subject misuses the subject of the grant. As if a nuisance be created. Here the grant is void as to such parts \*as are open [443] to objection. The grant neither *divests the Crown nor invests the grantee*.<sup>(h)</sup>

Other cases, more recent than the above, are valuable, as they recognise the principles to which we have already drawn attention. Trespass was brought by sir — Chad, Bart. against the defendant Tilsed. A grant of wreck was shown from Henry II., confirmed by inspeimus in the reign of Henry VIII. to certain proprietors of lands on the coast. These proprietors having determined upon reclaiming a portion of the sea shore, erected an embankment across a bay, which became at low water, a great expanse of uncovered mud, intersected by a small inlet or gully only a few feet wide, called, in the language of the county, a lake. The sea, however, forced the bank, and re-entered, but the same right of ownership continued to be maintained. And in this arrangement there was an uniform acquiescence for forty years. The defendant's case was that he fished in the inlet thus thrown open by the sea, by virtue of ancient grants, but he failed in substantiating his case, and the verdict went for the plaintiff. The defendant's counsel then moved for a new trial, alleging that the soil between high and low water mark was vested in the Crown, that the grant of wreck did not convey any right to the soil, that the acts of the proprietors were acts of usurpation, and that the period of forty years would not confer a right. The counsel for the plaintiff did not attempt to controvert the prerogative of the Crown, but he said, that *anterior usage and an anterior assertion of right might be presumed*, and that a prescription of such antiquity, coupled with the general grant, was quite conclusive. And of that opinion were the court. Not that the lapse of forty years was conclusive, but it was evidence; whence it might be presumed, the same cause was pursued in earlier times, in the absence of proof to the contrary. The rule was discharged.<sup>(i)</sup> An individual might claim the right either by grant or by usage independently of grant.<sup>(j)</sup> By which observation of Richardson, J., it

(e) 1 Sid. 149, in *Bulstrode v. Hall* and another.

(f) 10 Price, 378.

(g) Id. 412.

(h) Price, 378, *Attorney General v. Parmeter*; and see Id. 412, *Attorney General v. Burridge*.

(i) 2 Br. & B. 403, *Chad v. Tilsed*.

(j) Id. 409.

may be understood, that the usage afforded abundant demonstration that "when the grantees came to act under *their grant*, they found an obstacle in an *earlier and better title*."(*k*)

The case from Jersey of a right claimed by the Lord of a Manor to cut sea-weed *below* the low water mark, proceeded on the same principles. There must have been either a grant from the Crown, or a user so long continued and peaceable as to confer such a title by prescription.(*l*)

Again, for four hundred years, the Duke of Beaufort and his ancestors appeared to have enjoyed the seigniories of Gower and Kilney under the general name of "Terra de Gower." Part of this manor lay on the shore between high and low water mark, and the corporation of Swansea committed a trespass by making public walks thereon, upon which trespass was brought. The learned Judge at the trial \*appears to have been satisfied with the evidence of grants brought forward [\*444] by the Duke, and he put this short question to the jury, whether the land here between the high and low water mark was or not part of the seigniority of Gower. To which the jury returned an answer in the affirmative. And all the learned Barons of the Exchequer held this ruling to be correct. They acknowledged the principle that the sea shore *may* be parcel of a manor. The words "Terra de Gower," certainly might include the sea shore, and the jury had found that it did. The Court seemed to think it clear that a title so carefully preserved for centuries was sufficient to warrant them in upholding the verdict in favour of the validity of the grant.(*m*)

In examining these rights, either in support of the prerogative, or with reference to disputes between private parties, it seems desirable to avoid confounding two circumstances, which are entirely independent of the main principles. The first is the state of things connected with the constant changes which frequently happen to the shore. The second respects the frequent instances of non-intervention by the Crown upon the breaking out of litigation between subjects.

Land is often left by the sea, and thus become derelict. Sometimes land lately overflowed by the sea imperceptibly attaches itself to other land, *gradatim*, as it is said. This is alluvion. Sometimes there is a sudden disruption of the land from the ocean: this is called *avulsion*, being a forcible instead of a peaceful surrender. Sometimes, again, the sea gains the ascendancy, and swallows up the adjoining land, and then, after a lapse of time, sometimes retreats considerably, and leaves it derelict, either with marks which denotes the original property, or, generally, the former sea marks being obliterated.

(*k*) Ibid., per Richardson, J.

(*l*) 1 Knapp, 60, Benest, Appellant, Papon, Respondent.

(*m*) 3 Exch. 433, Duke of Beaufort v. Swansea. See 19 L. J., Exch. 97, Duke of Beaufort v. Smith.

The Abbot of Peterborough was questioned at the King's suit for acquiring thirty acres of marsh without the license of the King. The abbot pleaded the custom of the country,<sup>(n)</sup> and made a defence of alluvion. The land came per incrementum temporis, and it was terra per mare projecta. Such was the judgment in favour of the Abbot. "It was an acquiescence per projectionem, or alluvionem, not per recessum, or relictionem."<sup>(o)</sup> The Abbot of Ramsay was charged in respect of sixty acres of marsh. The Abbot said, he held the manor of Brancaster, which is situate next the sea, and that there was there a certain marsh, which sometimes was diminished by the influx, sometimes increased by the retirement of the sea, without this, &c. This was a claim of jus alluvionis, and the Abbot had a verdict before one of the Barons. "The title stood upon that which the Abbot alleged by way of increment." He relied on no custom, but upon the principle that as he suffered loss occasionally, so likewise he ought sometimes to reap benefit.<sup>(p)</sup>

[\*445] \*It is not to be understood, even in this case, that the Crown is not entitled by its prerogative to all this increment, to alluvion as well as avulsion, but as Sir William Blackstone observes: *De minimis non curat lex*: and, besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore possibly reciprocal consideration for such possible charge or loss.<sup>(r)</sup>

Philip Burnell, father of William, being seised of the manor of Hachesham, near Greenwich, died, his heir within age, during his minority. The Thames overflowed a great part of the land and meadow of the said manor, and of other lands contiguous. The Bishop of Bath and Wells was to stop the breach at his own charges, by agreement with the King, and, by way of reimbursement, was to hold the land for seven years. The land was regained, and the Bishop held the land for seven years, and three years over them. Burnell then desired relief for his land in Parliament against the Bishop. The answer was, *Sequatur versus episcopum ad communem legem*, which would not have been if the King had been intitled by the inundation.<sup>(s)</sup> The Crown here seems to have declined to enter personally into the dispute between the Bishop and the claimant. Burnell having doubtless discovered some marks by which his land could be identified, prepared to recover it, an attempt which by law he would have been warranted in making. The King, aware that the Bishop had been at some costs to redeem this land, resolved to leave the matter to the decision of *Nisi Prius*. The King could hardly have been entitled if the sea marks were not gone, whatever relief in Equity the Bishop

(n) See 2 Mod. 107, confirming the idea that there is such a custom in Lincolnshire.

(o) Hale de Jure Maris, p. 29. M. 23. E. 3, Lincolnia. 16 Vin. Ab. Tit. (Prerogative of the King), B a (3). S. C. differently reported.

(p) Hale de Jure Maris, p. 28. Dy. 326 (b), Digges v. Hamond.

(r) 2 Com. 262. See Dy. 326 (b).

(s) Hale de Jure Maris, 8 E. 2, p. 15.



might have in modern days with reference to these charges. Noticing this case, Lord Chancellor Cottenham said, "The only fair inference from that is, 'you cannot have it by favour;' it entitles you by right, and not by favour; it only refuses the favour." (t)

Lord Yarborough traversed an inquisition in Lincolnshire, alleging that the land stated to be derelict had been formed by alluvion. The alteration appeared to have been slow and gradual. The gain in twenty-six or twenty-seven years having been on the average of about five yards and a half in the year, but imperceptible, a verdict was found for Lord Yarborough, and judgment given finally against the Crown; the principle of alluvion, by the projection of extraneous matter, being too clear to be misunderstood. (u)

The other circumstance worthy of remark, in order to prevent confusion in considering this matter, is the frequent non-intervention of the Crown; and this forbearance or neglect to interfere arises either from the smallness of the usurpation, or that the thing in dispute belongs properly to private parties; *res inter alios acta*. The River Severn had gained upon Shinbridge, but as it gained upon Shinbridge so it lost to Aure on the other side. At length the river threw back the land, so to speak, to Shinbridge, and the question lay between \*Aure and Shinbridge [\*446] which vill should have the land thus regained. It was decided [v] against Aure. But the King did not claim it, though the Severn in that place was an arm of the sea. (v)

Several instances have been already cited where the Courts have been engaged with litigation between subject and subject, but where no claim has transpired on the part of the Crown. Where, however, there is reason to think that a nuisance is about to be set up, or that a public inconvenience has already occurred, the prerogative of the Crown is called forth as the natural protector of the public welfare. Certain canal proprietors, deriving their title originally from the Duke of Bridgwater, had exercised various acts of ownership over a pool called the Big Pool. This was a pool which had been artificially formed. The soil belonged to the Crown, as parcel of the Manor of Hatton. The ground was of course covered with water, which was pounded back for the purposes of the canal. It was likewise used as a passage for waste water on the surface when necessary; and so far the canal proprietors did not seem to have very materially overstepped their powers. But, at length, they erected some lime kilns, some of which stood on the water way of the Big Pool; and then the Crown interfered. This was an act inconsistent with the retaining of the freehold of the soil in the Crown. This was the first

(t) Speech of Mr. Sergeant Merewether, p. 19.

(u) 3 B. & C. 91, R. v. Lord Yarborough. Affirmed in the House of Lords. 5 Bing. 163. 2 Bligh. N. S. 147. 1 Dow. N. S. 178. S. C. 4 D. & Ry. 790. So is *Scrutton v. Brown*, 4 B. & C. 485.

(v) *Hale de Jure Maris*, p. 16. Claus. 18 H. 3, n. (21), *Villetta de Shinberg* in Gloucestershire.

decisive act by which the canal proprietors gave up the use of the land *for the purposes of the canal*, and treated it as if they were the general proprietors. Until that was done, it was not easy to see how the Crown was called on, or could properly have asserted a right to the exclusive possession, or treated the canal proprietors as trespassers.<sup>(w)</sup> This case is not cited as an authority in favour of the right of the Crown to the sea shore, but it is mentioned as an apt illustration of the forbearance of the Crown until some act should be ventured upon deserving of rebuke.

The lessees of a fishery had openly landed their nets for twenty years on the shore of a public navigable river (the Derwent.) No case of nuisance was made out against them, and in an action upon the case brought by them for disturbance of their rights, the Court held that a grant of the right of landing might be presumed.<sup>(x)</sup>

The lords of the manor of Brighton brought an action of trespass against the defendant for taking wreck. The right of the Crown *prima facie* was admitted, and the possible grant of the soil to the lord of the manor was acknowledged; but Bayley, J., added these remarkable expressions: "The right of the Crown is not in general for any beneficial interest to the Crown itself, but for securing to the public certain privileges in the spot between high and low water mark; and if any nuisance is committed on that spot, then the Crown has the power of proceeding to rectify the nuisance."<sup>(y)</sup>

[\*447] \*The proper way of asserting these rights by lords of manors, is by proving acts of ownership. These matters of evidence do not affect the prerogative; on the contrary, *the evidence given by the lord presumes a grant from the Crown.*<sup>(z)</sup>

So again, with the conservancy in rivers, or with the conservancy in fishing, the Crown will not interfere, unless, indeed, the powers of such conservancy were improperly exercised. But if the soil be meddled with, the prerogative of the Crown immediately attaches, and herein consists the distinction which, when well considered, prevents the reader from being misled.

"The Mayor and Corporation of the city of London have for a very long period held and exercised the office of Conservator of the River Thames: they have, moreover, within the last few years, granted license to different parties to embank parts of the strand or soil of the said

(w) 19 L. J., Q. B. 242, *Doe d. The Queen and Finch v. Abp. of York and others*.

(x) 2 Brod. & Bing. 687, *Gray and another v. Bond and another*.

(y) *Hall's Rights, &c.*, 263, *Dickens v. Shaw*. See also 4 B. & C. 485, *Scrutton v. Brown*, where the lord of a manor in Essex established his right to the soil of the sea shore as a grantee. Speech of Mr. Sergeant Merewether, p. 43, *Mr. Ward's case*.

(z) 3 Man. & Ry. 329, *Lopez v. Andrew*. 7 C. B. 861, *Calmady v. Rowe*.

river.”(a) The conservancy seems to be a matter distinct from the licenses: and thus, as soon as the rights of the prerogative were supposed to be invaded, we find a proceeding instituted, *ex officio*, by the Attorney General.

To offer any opinion upon a question, the issue of which has not yet been tried, would be premature. The case is cited in order to shew that, although the Crown appears to have been frequently and justifiably silent upon several occasions, where disputes have arisen between subject and subject, or where the particular transaction has not come fully into view, yet that immediately upon a disclosure to the law officers of the supposed invasion, they have not been wanting in energy to repress it on the ground of the prerogative.

The same resolution on the part of the Crown appeared in the case of an enclosure in Waltham Forest. As soon as the defendant made a ditch or fence on the soil of the forest, he was charged with an illegal enclosure, with doing damage to the vert and venison, and to the Queen’s disherison.(b) The charge here was for an injury to the incorporeal right of forest; it was not an information of intrusion into the lands of the Crown, but the case manifests the view which the law officers took upon being certified of acts which might prove prejudicial to the rights of the Sovereign.

Some doubts have been thrown upon the authenticity of the Treatise ascribed to Lord Hale—*De Jure Maris*.(c)—But supposing it to be, or not, the work of Lord C. J. Hale, it seems to agree with the opinions of text writers and of many decisions. And it may, perhaps, be suggested, by way of internal evidence, that the arguments of \*Lord Hale in *Sir Robert Atkyns v. Clare*,(d) and *Collingwood v. Pace*,(e) and his arguments likewise as reported to us in the *State Trials*, savour in some degree of the quaintness, clearness, and force conspicuous in the *Treatise De Jure Maris*. Besides, not content with impugning the authority of this book, Mr. Serjeant Merewether expresses a doubt, not, indeed, as to the authenticity, but as to the authority of *Callis*.(f) This is almost proving too much. For *Callis*, or *Callice*, was a Serjeant-at-law in the reign of Queen Elizabeth, and, of course, much anterior to Lord Hale, and he appears to have laid down the principle of ownership in the Crown without the least fear of argument on the subject.(g) Now, as to the authority of *Callis*, Buller, J., a Judge of great note in his

(a) Jerwood’s Dissertation, p. 1. See the case, which at present has been confined to the question of exceptions to the answer of the corporation in Chancery. 8 Beav. 270. 14 L. J., Canc. 305. 1 H. L. 440. 18 L. J., Canc. 314, Attorney General v. Corporation of London; and ante in this Treatise, p. 23.

(b) See 14 Mees. & W. 301, Attorney General v. Brown. 16 Mees. & W. 569. 1 Exch. 211. Attorney General v. Hallett. See also 16 Mees. & W. 97. 3 Dowl. & L. 685, S. C.

(c) Speech of Mr. Serjeant Merewether, pp. 11. 38.

(d) 1 Vent. 399.

(e) Id. 413.

(f) Speech, p. 33.

(g) On Sewers, 54, 55. 115.

day, has observed, concerning sewers, that Callis's Readings is "one of the best performances on that subject, and which has always been admitted as good authority."(*h*)

It has thus been endeavoured to shew that the prerogative of the Crown extends to the soil of the sea within the realm of England, to the shore situate between high and low water mark, and to the land beneath tidal rivers. It may be asserted, that it is more to the advantage of the people at large than if the right resided absolutely in a subject. The frequent disputes respecting the shore, the numerous instances of grants in which the Crown appears to have been imposed upon, and the inconvenience which has resulted upon occasions from the conduct of owners who have had bona fide grants, prove the case in favour of the sovereign's better title. The idea of universal proprietary of soil in the Crown, though but a shadow in modern times, is of more useful application than that of exclusion of the prerogative. Some one must have been the primary occupant, and the experience of our history has taught us that we have attained our present eminent position in the society of the world, so to speak, notwithstanding a general regal dominion, whereas it would seem highly uncertain whether we should have enjoyed similar independence, liberty and honour, if the soil of the shore had been parcelled out into numerous petty estates. Our condition might have been in that case scarcely superior to the lesser tyrannies which are found at the mouth of the great African rivers, where access to the interior of the country is denied, unless the cravings of the small maritime prince next the sea be first satisfied. This point may be illustrated in a slight degree by consulting the case of *Dimes v. The Grand Junction Canal Company*.(*i*) It is not necessary to discuss the merits of that case. It is sufficient to shew that it became in the power of an individual to stop a vast commercial traffic by reason of a legal omission. On the other hand, where staiths were erected in a public navigable river for loading ships, the question presented to the jury was, not whether a private right had been infringed, but whether the alteration had been one for the public convenience. "Make an erection for pleasure, for whim, for caprice; and if it interfere in the least degree with the [\*449] public right of passage, it is a nuisance. Erect \*it for the purposes of trade and commerce, and keep it applied to the purposes of trade and commerce, and subject to the guards with which this case was presented to the jury, the interests of trade and commerce give it a protection, and it is a justifiable erection, not a nuisance."(*k*) Lord Tenterden differed from Bayley, J., and Holroyd, J., on the point of misdirection. His Lordship took the question to be, whether the navigation and passage of vessels on this public navigable river was injured by these erections.(*l*) All the Judges, therefore, agreed in viewing this case as one which turned upon the public convenience. The Crown did not claim the soil, for the shore seemed to have been distributed into rights.

(*h*) 2 T. R. 365.

(*k*) 6 B. & C. 595, by Bayley, J.

(*i*) 9 Q. B. 469.

(*l*) Id. 602.

There was a public right of navigation in the river, (the Tyne,) for a traffic in coals and other purposes. There were also public or private rights of fishing; public or private rights on the shore.<sup>(m)</sup> The case was, therefore, decided upon an indictment for the nuisance in the river.<sup>(n)</sup>

From these and other considerations, therefore, and from authorities, we venture to draw the inference, not only that the soil of the coast is in the King, as one of the flowers of his prerogative, not merely that he has had the immemorial and almost undisputed dominion over the shores, but that it is essential and important for the public welfare that he should be endowed with such a right of proprietary. For in the absence of a grant, the Crown looks upon every private assumption as a trespass, and, notwithstanding a grant, if the public interest be invaded, or the privileges of the people narrowed, the grant pro tanto is void, and in the room of a rightful user by the grantee, there arises a purpresture.

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## \*PRECEDENTS AND FORMS. [451]

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### LAW OF WATERS.

#### I.

*Declaration in Debt. For an Instalment of a Subscription towards making a Canal under a private Act of Parliament.*

[2 Chit. Pleading, by Greening, p. 293.]

FOR that whereas, before the making of the call of money hereinafter next mentioned, and also before the making of a certain act of Parliament made and passed in the forty-ninth year, &c., intituled, &c., [*here set out the title of the act,*] to wit, on, &c., at, &c., the defendant in and by a certain instrument in writing, then and there signed by him, subscribed and undertook to advance and lend a certain sum, to wit, &c., to make, and with other sums of money to be subscribed by divers other persons the sum of, &c. of lawful, &c., to be applied in addition to the sum of, &c., granted by Parliament in the improvement, &c., on the credit of the funds, to be vested in the commissioners by an act of Parliament to be obtained for &c., [*here state the purposes of the act,*] the said money to be advanced at instalments of twenty-five per cent., at not less than six months distance

(m) 6 B. & C. 586, per Holroyd, J.

(n) Id. 586, Rex v. Russell and others.

from each other, and the first call not to be sooner than six months from the then present time; and whereas the defendant having so subscribed as aforesaid, afterwards, and after the passing of the said statute so made and passed in the year, on, &c., to wit, &c., at, &c., certain persons, to wit, &c., then and there respectively being commissioners for putting in execution the powers and authorities of the said first mentioned act, given and granted, did, by virtue of the powers and directions of the said act, duly make a certain call for the payment of all instalments, viz. one instalment of twenty per cent. upon the sum of, &c. so subscribed by the defendant as aforesaid, and the other sums of money subscribed for the purposes in the said act mentioned, and did then and there duly require the defendant to pay the sum, &c., (the same being the first instalment of and upon the said sum of, &c. so by him subscribed as aforesaid,) on or [\*452] before the — day of, &c. to the plaintiff, who at the time of making of such call was, and from thence hitherto had been, and still is, the treasurer to the said commissioners, whereof the defendant then and there had notice; and he, by reason of the premises, became and was liable to pay to the plaintiff as such treasurer as aforesaid, the said sum of, &c., being twenty per cent. on the said sum by him subscribed as aforesaid, whereby, &c. *actio accrevit*.

[See another Count, 2 Chit. Pleading, 5th ed., p. 392.]

## II.

### *Declaration for Disturbing a Private Right of Fishery.*

[2 Chit. Pleading, by Greening, p. 666.]

Venue, local.

For that the defendant, on, &c., and on divers other days and times, between that day and the day of exhibiting this bill, with force and arms, &c., broke and entered the close of the plaintiff covered with water, called — [or abutting on, &c.] and then fished in the said close for fish, and the fish, to wit, — salmon, — trout, — pike, — carp, — tench, — perch, — roach, and — eels, of the plaintiff, of great value, to wit, of the value of £—, there then found and being caught, and took, and carried away, the same, and converted and disposed thereof to his own use. And also for that the defendant, on, &c., and on divers other days and times, between that day and the commencement of this suit, with force and arms, &c., broke and entered the several fishery of the plaintiff, in a certain river called —, situate in the parish of —, in the county of —, and then and there fished in the said fishery for fish, and the fish, to wit, &c., (enumerate as in the preceding form,) of the plaintiff, there then found and being of great value, to wit, of the value of £— caught, took, and carried away, and converted and disposed thereof to his own use. And also for that the defendant on, &c., and on divers other days and times, between that day and the commencement of this suit, with force and arms, &c., in the free fishery of the plaintiff, in the parish

aforesaid, in the county aforesaid, fished, and the fish, to wit (as in the form, supra,) there then found and being of great value, to wit, of the value of £——, caught, took, and carried away, and converted and disposed thereof to his own use. And also for that the defendant on, &c., aforesaid, and on divers other days and times, between that day and the commencement of this suit, with force and arms, &c., caught took, and carried away other the dead fish, to wit, (as in the form, supra,) of the plaintiff, there then found and being, of great value to wit, of the value of £——, and converted and disposed thereof to his own use, to wit, at, &c., aforesaid.

\*III.

[\*458]

*Plea to the above. Liberum tenementum of Defendant.*

[3 Chit. Pleading, by Greening, p. 369].

And for a further plea in this behalf, as to the fishing in the said fishery in the said declaration mentioned, and the said fish there found and being, catching, seizing, taking, and carrying away, and converting and disposing thereof to his own use, the defendant says, that the place in which the said supposed several fishery now is, and at the said several times, when, &c., was a certain close or piece or parcel of land covered with water, and which said close or piece or parcel of land now is, and at the said several times, when, &c. was the close, soil, and freehold of the defendant, wherefore the defendant, at the said several times, when &c. entered into the said close, piece or parcel of land, and fished there for fish, and the said fish in the said declaration mentioned, there found and being, caught, seized, took, and carried away, and converted and disposed thereof to his own use, as it was lawful for him so to do for the cause aforesaid; which are the said several alleged trespasses in the introductory part of this plea mentioned, and whereof the plaintiff hath above complained against the defendant. And this the defendant is ready to verify.

And for a further plea in this behalf, as to the said alleged trespasses in the introductory part of the said last plea mentioned, and therein justified, the defendant says, that the said fishery in the said first count mentioned, and in which, &c. now is, and at the said several times, when, &c. was the several fishery of the defendant; wherefore the defendant, at the said several times, when, &c. being seasonable times of the year for that purpose, fished in the said fishery in the said first count mentioned, and the said fish in the said first count mentioned there found and being, caught, seized, took, and carried away, and converted and disposed thereof to his own use; as it was lawful, &c.—[*As in the former plea to the end*].

[*Third plea, same introduction as above*].—That he the defendant, before and at the said several times, when, &c. in the said declaration mentioned, was and still is seised in his demesne as of fee, of and in

divers, to wit, two thousand acres of land, with the appurtenances, situate, lying, and being in the parish aforesaid, and that the defendant, and all those whose estate he now hath, and at the said several times, when, &c. had, of and in the said land with the appurtenances, *from time whereof the memory of man is not to the contrary*, have had, and have been used and accustomed to have, and of right ought to have had, and the defendant still of right ought to have a *free fishery* in the said fishery in the said declaration mentioned, in which, &c., and during all the time aforesaid fished, and have been used and accustomed to fish, and of right ought to have fished, and still of right ought to fish in the same fishery for fish every year at all seasonable times of the year for fishing, at his and their free will and pleasure, and to take and carry away the fish from time to time caught by them therein as belonging and appertaining to the said land [\*454] *\*with the appurtenances*. Wherefore the defendant, at the said several times when, &c., the same being seasonable times of the year for that purpose, fished in the said fishery in this plea mentioned, and in which, &c. And the said fish in the said declaration mentioned, there found and being, took and carried away, and converted and disposed thereof to the use of the defendant, as he lawfully, &c.—[*Same conclusion as in the first plea*].

The plea of common fishery is precisely similar to the last plea of free fishery, inserting the words "*common of fishery*," instead of the words "*free fishery*."

[*Same introduction as in the plea, ante.*].—Because he says that the said alleged fishery, in which, &c., at the said several times, when, &c., was and still is, *and from time immemorial hath been* part and parcel of the said river, called the, &c., and that the said part thereof, in which, &c. now is, and at the said several times when, &c. was, *and from time whereof the memory of man is not to the contrary* hath been, a public and common navigable river, in which the tides and waters of the sea during all the time aforesaid have flowed and reflowed, and that in the said part of the same river called the, &c., in which, &c., every subject of this realm at the said several times, when, &c. of right had, and of right ought to have had, still hath, and of right ought to have the liberty and privilege of fishing. Wherefore the defendant, being a subject of this realm, at the said several times, when, &c., entered into the said fishery, in which, &c., so being part of the said navigable river as aforesaid, where the tides and waters of the sea flow, to fish in the said river there, at the said several times, when, &c., being seasonable times of the year for such fishing, and at those several times did fish there, as it was lawful, &c.—[*Conclude as in the first plea.*]

#### IV.

*Indictment for Taking or Destroying Fish in water adjoining to a Dwelling-house.*

[1 Archbold's Peel's Acts, 2nd ed. p. 105].

BERKSHIRE, to wit: The jurors for our lord the King upon their



oath present, that A. B., late of the parish of —, in the county aforesaid, labourer, on the second day of July, in the eighth year of the reign of our sovereign lord George the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland, King, defender of the Faith, with force and arms, at the parish aforesaid, in the county aforesaid, in a certain close adjoining [*or belonging*] to the dwelling-house of C. D., there situate, in a certain pond [*or stream*] of water there being, whereof the said C. D., was then and there the owner [*or “wherein the said C. D. then had a right of fishery”*], ten fish called trout, of the price and value of ten pence, then and there being found, then and there in the said pond unlawfully and wilfully did take [*or destroy*]: against the form of the statute in that case made and provided, and against the peace of our lord the King, his Crown and dignity.

\*V.

[\*455]

*Conviction for Taking or Destroying Fish elsewhere than as above.*

[1 Archbold's Peel's Acts, 2nd ed. p. 106].

BERKSHIRE, to wit: Be it remembered, that on — day of —, in the year of our Lord —, at —, in the county aforesaid, A. B. is convicted before me, J. P., one of his Majesty's justices of the peace for the said county, for that he the said A. B., on the — day of —, in the year aforesaid, at the parish of —, in the county aforesaid, in a certain pond [*or stream*] of water there situate, the private property of C. D. [*or wherein C. D. then had a private right of property*] ten fish called trout, of the value of ten pence, then and there being found, then and there in the said pond unlawfully and wilfully, did take [*“take or destroy, or attempt to take or destroy”*]; against the form of the statute in that case made and provided: I the said J. P. do therefore adjudge the said A. B. for his said offence, to forfeit and pay the sum of [five] pounds, over and above the value of the said fish so taken as aforesaid, and the further sum of [ten pence], being the value of the said fish, and also to pay the sum of — shillings\* for cost; and in default of immediate payment of the said sums, to be imprisoned in the — [and there kept to hard labour] for the space of —, (see s. 67, *post*), calendar months, unless the same sums shall be sooner paid; and I direct that the said sum of five pounds shall be paid to J. S., (see s. 66, *post*), of — aforesaid, in which the said offence was committed, to be by him applied according to the direction of the statute in that case made and provided, and that the said sum of ten pence shall be paid [to the said C. D., *or if he have*

\* *If time be given for the payment of the penalty, &c., the form of the conviction may be the same as the above, to the \** “for costs and I order that the said sums shall be paid by the said A. B. on or before the — day of — next: and I direct that the said sum of five pounds shall be paid to J. S., of, &c.” *as in the above form to the end.*

been examined in proof of the offence, then thus ; "also to the said J. S., the said C. D. having been examined in proof of the offence aforesaid"]; and I order that the said sum of — shillings for costs shall be paid to — (the complainant). Given under my hand and seal, the day and year first above mentioned.

J. P.

[\*456]

\*VI.

*Indictment for breaking down the Dam of a Fish Pond.*

[1 Archbold's Peel's Acts, 2nd ed. p. 229].

BERKSHIRE, to wit : The jurors for our lord the King upon their oath present, that A. B., late of the parish of —, in the county aforesaid, labourer, on the second day of July, in the eighth year of the reign of our sovereign lord George the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, with force and arms, at the parish aforesaid, in the county aforesaid, the dam of a certain fish pond ["*of any fish pond, or of any water which shall be private property, or in which there shall be a private right of fishery*"] of one C. D., there situate, unlawfully and maliciously did break down and destroy, ["with intent thereby then and there to take and destroy the fish in the said pond then and there being:" or "and did thereby then and there cause the loss and destruction of divers of the fish in the said pond then and there being"]: against the form of the statute in that case made and provided, and against the peace of our lord the King, his Crown and dignity.

VII.

*Indictment for putting Lime, &c. into a Fish Pond.*

[1 Archbold's Peel's Acts, 2nd ed. p. 280].

BERKSHIRE, to wit : The jurors of our lord the King upon their oath present, that A. B., late of the parish of —, in the county aforesaid, labourer, on the second day of July, in the eighth year of the reign of our sovereign lord George the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully and maliciously did put a large quantity, to wit, five bushels of lime ["*lime or other noxious material*"] into a certain fish pond ["*any fish pond or any water which shall be private property, or in which there shall be a private right of fishery*"] of one C. D., there situate, with intent thereby then and there to destroy the fish in the said pond then and there being : against the form of the statute in that case made and provided, and against the peace of our lord the King, his Crown and dignity.

## \*VIII.

[\*457]

*Form of Conviction for taking Fish illegally in the Thames*

[Under 30 Geo. 2, c. 21, s. 12].

To wit: Be it remembered, that on this — day of — in the — year of his Majesty's reign, A. B. is convicted before me, one of his Majesty's justices of the peace for the city or county of —, (as the case shall happen to be) for [*here set forth the offence,*] and I do adjudge him to pay and forfeit for the same the sum of —. Given under my hand and seal the day and year aforesaid.

## IX.

*Declaration for not doing the Accustomed Suit to a Mill.*

[8 Wentw. p. 523].

CARDIGANSHIRE, to wit. Thomas Edwards and James Edwards complain of David Jenkins and Catherine Jenkins, being, &c.; for that whereas the said Thomas and James, on the 30th day of May, 1787, and long before, were, and continually from that time hitherto have been, and still are lawfully possessed of and in a certain ancient water corn mill, with the appurtenances, situate, standing, and being within the manor and lordship of Hampeter Pont Stephen, in the said county of Cardigan; and the said Thomas and James being so possessed of the said mill, with the appurtenances, by reason thereof, during all the time aforesaid, have had, and of right ought to have, for all the time aforesaid, toll of all *corn, grain and malt* ground in the same mill: And whereas the said David and Catherine, on the same day and year aforesaid, and long before, were, and continually from thenceforth hitherto hath been, and still are, possessed of and in a certain messuage or dwelling-house, with the appurtenances, situate, standing, and being within the manor or lordship aforesaid, in which said messuage or dwelling-house the said defendants did for all the time aforesaid, inhabit and dwell, and still inhabit and dwell, and by reason thereof, for all the time aforesaid, ought to have ground, and still of right ought to grind at the aforesaid mill all their *corn, grain and malt*, which after the grinding thereof had been or should be used and spent in their said messuage or dwelling-house, and to pay the said Thomas and James for the grinding thereof a reasonable toll; nevertheless the said defendants, well knowing the premises, but designing and maliciously intending unjustly to injure and damnify the said plaintiffs in this behalf, and to hinder and deprive them of the profit and advantages which ought to have accrued to them from and by reason of the grinding of the said *corn, grain and malt* of the said \*de- [\*458] defendants by them after the grinding thereof within the time

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aforesaid, used and spent in their said message or dwelling-house, to wit, on the 30th day of May, 1787, and on divers other days and times between that day and the day of exhibiting the bill of the said plaintiffs, at Lampeter Pont Stephen aforesaid, in the said county, did withdraw their grist from the said mill of the said Thomas and James, and did grind and cause to be ground a large quantity of *corn, grain, and malt*, that is to say, *one thousand quarters of corn, one thousand quarters of grain, and one hundred quarters of malt* by them, after grinding thereof, in their said message or dwelling-house within that time aforesaid used and spent, in and at another mill than the said mill of the said plaintiffs, to wit, at L. P. S. aforesaid, in the said county, by reason whereof the said plaintiffs have totally lost the profit and advantage which they ought to have got and obtained from the grinding thereof at their said mill, to wit, at L. P. S. aforesaid in the said county: And whereas also, &c. [2nd count same as first, only stating the custom to be to grind malt only, and therefore omitting the words in italics:] And whereas also the said Thomas and James, on the 30th of May, 1787, and long before were, and continually from thenceforth hitherto have been, and still are lawfully possessed of and in a certain other ancient water corn mill, with the appurtenances, situate, lying, and being within the said manor or lordship of Lampeter Pont Stephen aforesaid, in the said county; and the said plaintiffs, being so possessed of the said last mentioned mill, with the appurtenances, by reason thereof, during all the time last aforesaid, have had, and of right ought to have, for all the time last aforesaid, toll of all corn, grain, and malt ground in the said last mentioned mill: And whereas also the residents and inhabitants residing and inhabiting in houses within the said manor or lordship of L. P. S. (save and except such inhabitants and residents residing and inhabiting in houses within the said manor as are bound to any other mill with some part of their corn, and save and except poor cottagers, that buy some meal ready ground) have during all the time last aforesaid ground, and still of right ought to grind all their corn, grain, and malt, which by them, or any of them, after the grinding thereof, had been and should be used or spent in their said respective houses, at the said last mentioned mill of the said plaintiffs: And whereas also the said defendants, on the 30th day of May, 1787, and long before were, and continually from thenceforth hitherto have been, and still are inhabitants and residents within the said manor or lordship, and are not, nor during the time last aforesaid were bound to any other mill than the said last mentioned mill of the said plaintiffs with any part of their corn, and are not, nor during the time last aforesaid were not poor cottagers that bought some meal ready ground, and during all the time last aforesaid have resided and dwelt, and still do reside and dwell in a certain other dwelling-house, with the appurtenances, situate, standing, and being within the said manor aforesaid, and by reason thereof, for all the time last aforesaid ought to have ground, and still ought to grind at the said last mentioned mill of the said plaintiffs all their corn, grain, and malt, which after the grinding thereof by them, or either of them, had been or should be used or spent in their said last mentioned dwelling-house, and to pay to the said Thomas and James for

the grinding thereof a reasonable toll; nevertheless [grievances same as in first count, and so on to the end]: And whereas also, &c. [4th count same as third, with the same difference as between the second and first]: \*And whereas also the said Thomas and James afterwards, to [\*459] wit, on the said 30th day of May, 1787, and long before were, and continually from thenceforth hitherto have been, and still are lawfully possessed of and in a certain ancient water corn mill, with the appurtenances, situate, lying, and being within the manor or lordship of L. P. S. aforesaid, in the said county, and the said plaintiffs being so possessed of the said last mentioned mill, with the appurtenances, by reason thereof, during all the time last aforesaid, have had, and of right ought to have, for all the time last aforesaid, toll of all corn, grain, and malt ground in the said last mentioned mill: And whereas also the residents and inhabitants residing and inhabiting in houses within the said manor or lordship of L. P. S. aforesaid, in the said county, during all the time last aforesaid, ought to have ground, and still of right ought to grind all their corn, grain, and malt which by them, or any of them, after the grinding thereof, had been or should be used or spent in their said respective houses, at the said last mentioned mill of the said plaintiffs: And whereas also the said defendants, on, &c., and long before were, and continually from thenceforth hitherto have been, and still are inhabitants and residents within the said manor or lordship, and during all the time last aforesaid have resided and dwelt, and still do reside and dwell in a certain other dwelling-house, with the appurtenances, situate, standing, and being within the manor or lordship aforesaid, and by reason thereof, and for all the time last aforesaid ought to have ground, and still of right ought to grind in the said last mentioned mill of the said plaintiffs, all their corn, grain, and malt, which after the grinding thereof by them or either of them, had been or should be used or spent in their said last mentioned dwelling-house, and to pay to the said plaintiffs for the grinding thereof a certain reasonable toll; nevertheless [the gravamen same as in the first count, and so on to the end]: And whereas, &c. [6th count same as fifth, with the same difference as between the second and first]: And whereas also the said plaintiffs, on, &c., and long before were, and continually from thence hitherto have been, and still are lawfully possessed of and in a certain other ancient water corn mill, with the appurtenances, situate, lying, and being within the manor or lordship of L. P. S. aforesaid, in the said county: and the said plaintiffs being so possessed of the said last mentioned mill, with the appurtenances, by reason thereof, during the time last aforesaid, have had, and of right ought to have for all the time last aforesaid, toll of all *corn, grain, and malt*, ground in the said last mentioned mill; and whereas the said defendants, on, &c., and long before were, and continually from thenceforth hitherto have been, and still are possessed of a certain other messuage or dwelling-house, with the appurtenances, situate, standing, and being within the manor or lordship aforesaid, in which said last mentioned dwelling-house they the said defendants did for all the time last aforesaid, and still do inhabit and dwell, and by reason thereof, for all the time last aforesaid, ought to have ground, and still of right ought to grind at the

said last mentioned mill all their *corn, grain, and malt*, which after the grinding thereof had been and should be used and spent in their said messuage or dwelling-house, and to pay for the grinding to the said plaintiffs a reasonable toll; nevertheless the said defendants, well knowing the premises last aforesaid, but designing and maliciously intending unjustly to injure and damnify the said plaintiff in this behalf, and to hinder and deprive them of the profits and advantage of their said last mentioned \*mill, and wrongfully and fraudulently designing and [\*460] maliciously intending to evade the grinding of the said last mentioned malt at the said last mentioned mill of the said plaintiffs, and to evade the paying of the said last mentioned reasonable toll arising and accruing to the said plaintiffs from the grinding of the said last mentioned malt at the said last mentioned mill of the said plaintiffs, on, &c., and on divers other days, &c., at, &c., in, &c., did withdraw other their grist from the said last mentioned mills of the said plaintiffs, and did not at all or during any part of the time last aforesaid grind or cause to be ground at the said mill any malt whatever, but during the time last aforesaid did wrongfully, injuriously, evasively, and deceitfully, in order to evade the grinding of the said last mentioned malt at the said last mentioned mill, and the payment of the last mentioned toll as last aforesaid, buy, and caused to be bought divers large quantities of malt ground, which had been ground elsewhere than at the said last mentioned mill of the said plaintiffs, and did then and there use and spend the said malt, ground and bought as last aforesaid, within the said last mentioned messuage of the said plaintiffs, and which the said defendants, at the time of using and spending thereof, knew to have been ground elsewhere than at the said last mentioned mill of the said plaintiffs, by reason whereof the said plaintiffs have totally lost the profit and advantage which they ought to have got and obtained from the grinding thereof at their said last mentioned mill, and the toll and multure arising therefrom, to wit, at, &c.: And whereas, &c. [this count same as the seventh, leaving out the words in italic]: And whereas also the said plaintiffs, on, &c., and long before were, and continually from thenceforth hitherto have been, and still are lawfully possessed of and in a certain other ancient water corn mill, with the appurtenances, situate, lying, and being within the manor or lordship of L. P. S. aforesaid, in the said county; and the said plaintiffs being so possessed of the said last mentioned mill, with the appurtenances, by reason thereof, during the time last aforesaid, have had, and of right ought to have, for for all the time last aforesaid, toll of all corn, grain, and malt ground in the said last mentioned mill: And whereas the residents and inhabitants residing and inhabiting in houses within the said manor or lordship of L. P. S. (save and except such inhabitants and residents residing and inhabiting in such houses within the said manor as are bound to any other mill with some part of their corn, and save and except poor cottagers that buy some meal ready ground) have during all the time last aforesaid, ground, and still of right ought to grind all their corn, grain, and malt, which by them, or any of them had been or should be used or spent, after the grinding thereof, in their said respective houses at the said last mentioned mill of the said plaintiffs, to wit, at, &c.: And

whereas also the said defendants, on, &c., and long before were, and continually from thenceforth hitherto have been, and still are residents and inhabitants within the said manor or lordship, and are not, nor during the time last aforesaid, were bound to any other mill than the said last mentioned mill of the said plaintiffs with any part of their corn, and are not, nor during the time last aforesaid were not poor cottagers that bought some meal ready ground, and during all the time last aforesaid have resided and dwelt, and still do reside and dwell in a certain other dwelling-house, with the appurtenances, standing, and being within the manor and lordship aforesaid, and by reason thereof, and during all the time last aforesaid ought to have ground, and still of right \*ought to grind at the said last mentioned mill of the said plaintiffs, all their [461] corn, grain, and malt which, after the grinding thereof, had been, or should be by them or either of them used or spent in their said messuage or dwelling-house, and to pay to the said plaintiffs for the grinding thereof a reasonable toll; nevertheless, &c. [gravamen same as in the seventh count, and so on to the end]: And whereas, &c. [this count same as the last, with the difference of *malt* only, instead of "corn, grain, and malt."] Damages, &c., Pledges, &c.

X.

*Declaration for Obstructing Water from flowing to Plaintiff's Mill, &c.*

[Pearson's Chit. Pleadings, ed. 1847, p. 623.]

For that whereas, before and at the times of the committing of the grievances by the defendant as hereinafter mentioned, the plaintiff was lawfully possessed of a certain mill and manufactory, and certain closes and premises [as the case may be], with the appurtenances, in the county aforesaid, and [by reason thereof] the plaintiff, before and at the times of the committing such grievances, of right ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the water of a certain stream which had been used to run and flow, and during all that time of right ought to have run and flowed, and still of right ought to run and flow [in great plenty and in its usual and proper course, flow and current] unto the said mill, manufactory, closes and premises of the plaintiff, for supplying the same with water for working, using and enjoying the said mill, &c., respectively, and for other necessary beneficial and useful purposes in that behalf; yet the defendant intending to injure the plaintiff, heretofore, to wit, on, &c., and on divers days and times afterwards and before the commencement of this suit, wrongfully and injuriously placed and erected a certain dam and hatch, and certain pipes and other erections in and across part of the said stream above the plaintiff's said tenements, and in and upon the banks and sides of the said stream above the plaintiff's said tenements, and wrongfully and injuriously there kept and continued the said dam,

hatch, pipes and other erections so there made, placed and erected for a long space of time, to wit, from thence until the commencement of this suit, *and thereby* during all that time unlawfully and wrongfully penned back and stopped the water of the said stream, and diverted and turned divers large quantities of the water of the said stream, which ought to have flowed to the said tenements of the plaintiff respectively, away from the said tenements, and prevented the same from flowing to the said tenements; and the defendant, further intending as aforesaid, on other days and times whilst the plaintiff was so possessed of his said tenements, to wit, on, &c., and other days and times afterwards and before the commencement of this suit, wrongfully and injuriously by means of the said dam, obstructions and erections and otherwise, wrongfully caused divers other large quantities of the water of the said stream to flow against and [\*462] past the said closes of the plaintiff respectively in a \*more violent, rapid and impetuous manner than the water of the said stream had been used and accustomed to flow, and otherwise might and would have flowed against and past the said closes of the plaintiff, and thereby to wash away a great part of the banks of the same closes, and greatly injure the same; by means of which said several premises the plaintiff was for and during all the time aforesaid hindered and prevented from using his said mill, manufactory, closes and premises, with the appurtenances, in so ample and beneficial a manner as he otherwise might and would have done, and the said several tenements of the plaintiff became and were and are thereby much injured and deteriorated in value; To the damages, &c.

# XI.

*Against the Occupier of Land for improperly keeping open the Hatch of a Reservoir connected with a Stream, whereby Plaintiff's Mill was not sufficiently supplied with Water.*

[Pearson's Chit. Pleadings, ed. 1847, p. 625.]

For that whereas the plaintiff, before and at the several times of the committing of the grievances hereinafter mentioned, was and from thence hitherto hath been and still is possessed of a certain water corn mill, with the appurtenants, in the county aforesaid, near to and upon a certain watercourse in the said county, and [*by reason thereof*] the plaintiff then of right ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the water of the said watercourse for the working of the said mill, and which water daring all that time ought to have run and flowed, and still of right ought to run and flow through and *over the flood hatch of and belonging to a reservoir* there along the said watercourse unto the said mill; and whereas also the plaintiff, by reason of his possession of the said mill; with the appurtenants, during all the time aforesaid, of right ought to have had and enjoyed, and still of right ought to have and enjoy the liberty and privi-



lege of having the water flowing into the said reservoir from time to time penned back *therein by means of the said flood hatch* for the supplying of the said mill with water sufficient for the working thereof; and whereas also the defendant was then and still is possessed of the said flood hatch of and belonging to the said reservoir, and by reason thereof from time to time during the time aforesaid of right ought to have penned back, and still of right ought from time to time to pen back in the said reservoir, by means of the said flood hatch, the water flowing into the same, for the supplying of the said mill with water and sufficient for the working thereof upon reasonable notice and request from the said plaintiff so to do; and the said plaintiff saith, that heretofore and whilst he was so possessed of the said mill and entitled to have the water penned back in the said reservoir as aforesaid, and whilst the defendant was so possessed of the said flood hatch and liable to pen back the water in the said reservoir as aforesaid, to wit, on, &c., and on divers other days and times between that day and the commencement of this suit, he, the plaintiff, gave notice to the defendant and requested him to pen back the water in *\*the said reservoir for the purpose of supplying the* [463] *said mill of the plaintiff with water sufficient for the working* thereof; and although the defendant might and ought so to have done at the several times aforesaid, the same being reasonable and proper times in that behalf; Yet the defendant, not regarding his duty in that behalf, but intending to injure the plaintiff, did not nor would, when he was so requested as aforesaid, or within any reasonable time afterwards, pen back the water in the said reservoir, but wholly refused and omitted so to do, and on the day and year first aforesaid, and for a long time afterwards, to wit, from thence continually until the commencement of this suit, wrongfully and injuriously kept and continued the said flood hatch open, and thereby during all that time prevented the water flowing into the said reservoir from being penned back therein; by reason whereof the said mill of the plaintiff could not during the time aforesaid be supplied with sufficient water for the working thereof; and the plaintiff, during all the time aforesaid, was prevented from working the said mill in so ample and beneficial a manner as he ought and otherwise would have done, and thereby lost and was deprived of divers great gains and profits, which he might and otherwise would have derived from the use of his said mill; and also by reason of the premises, the plaintiff, during the time aforesaid, to wit, on, &c., and on divers other days afterwards, was forced and obliged to grind at other mills of other persons divers large quantities of corn, to wit, 500 quarters of corn, which, but for the committing of the said several grievances by the defendant as aforesaid, he might and would have ground at his said mill, and in so doing was necessarily put to great trouble and expense of his moneys, to wit, the amount of £—, and lost divers profits which would otherwise have accrued to him, and was and is otherwise injured; To the damage, &c.

[*And see other Forms, p. 626, &c.*].

## XII.

*Denial of Plaintiff's right to the Use of the Water.*

[Pearson's Chit. Pleadings, ed. 1847, p. 674.]

Saith that the plaintiff ought not at any or either of the said times, when, &c., *by reason of his possession of his said mill, land and premises* to have had or enjoyed, nor ought he still to have or enjoy the benefit or advantage of the water of the said stream or watercourse so *diverted and obstructed [using the words in the declaration,]* as aforesaid, nor ought the water of the said stream or watercourse so diverted and obstructed as in the said declaration mentioned, of right to have run or flowed, nor ought the same to run or flow to the said mill, land and premises of the plaintiff in manner and form as the plaintiff has above alleged; and this defendants puts himself upon the country, &c.

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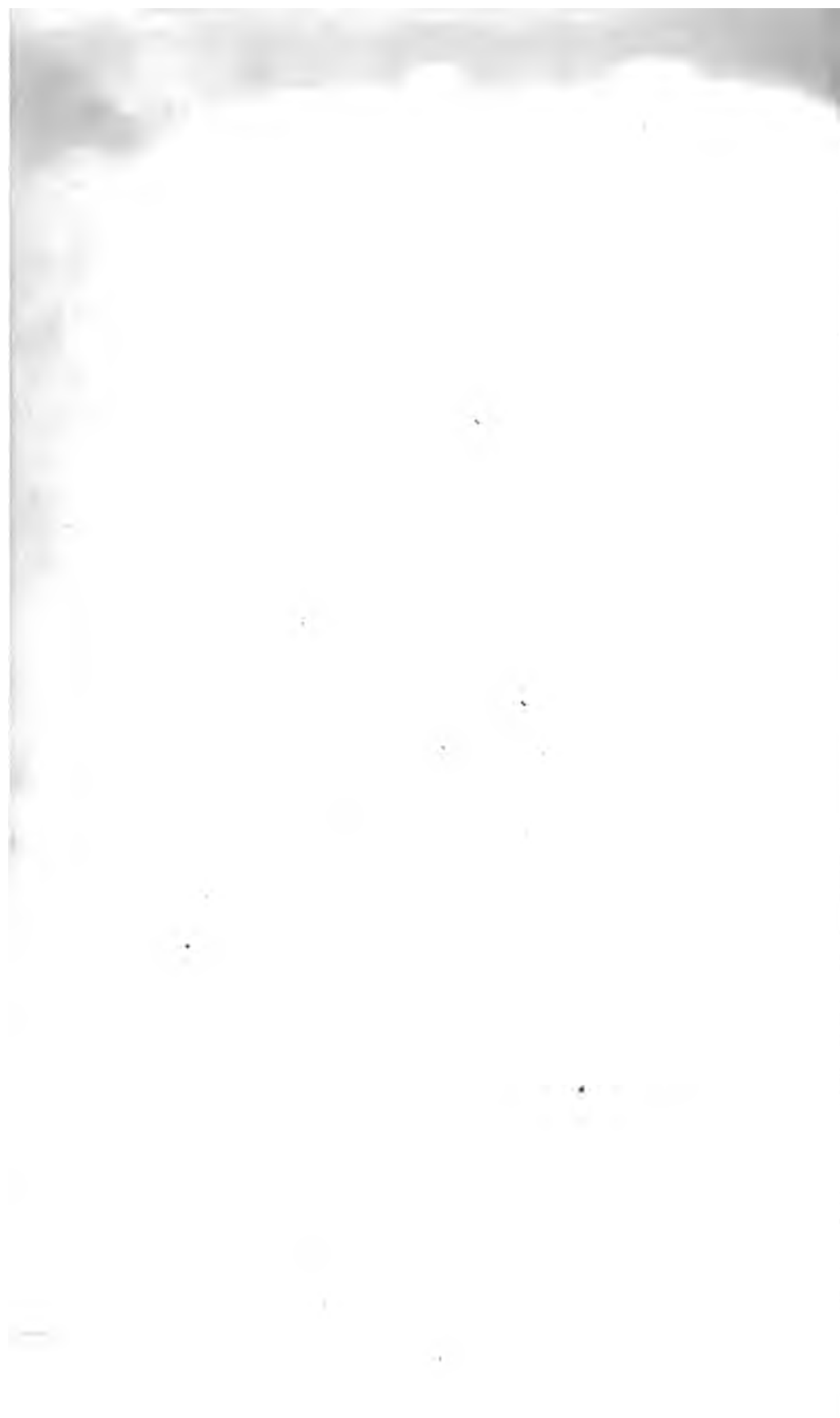
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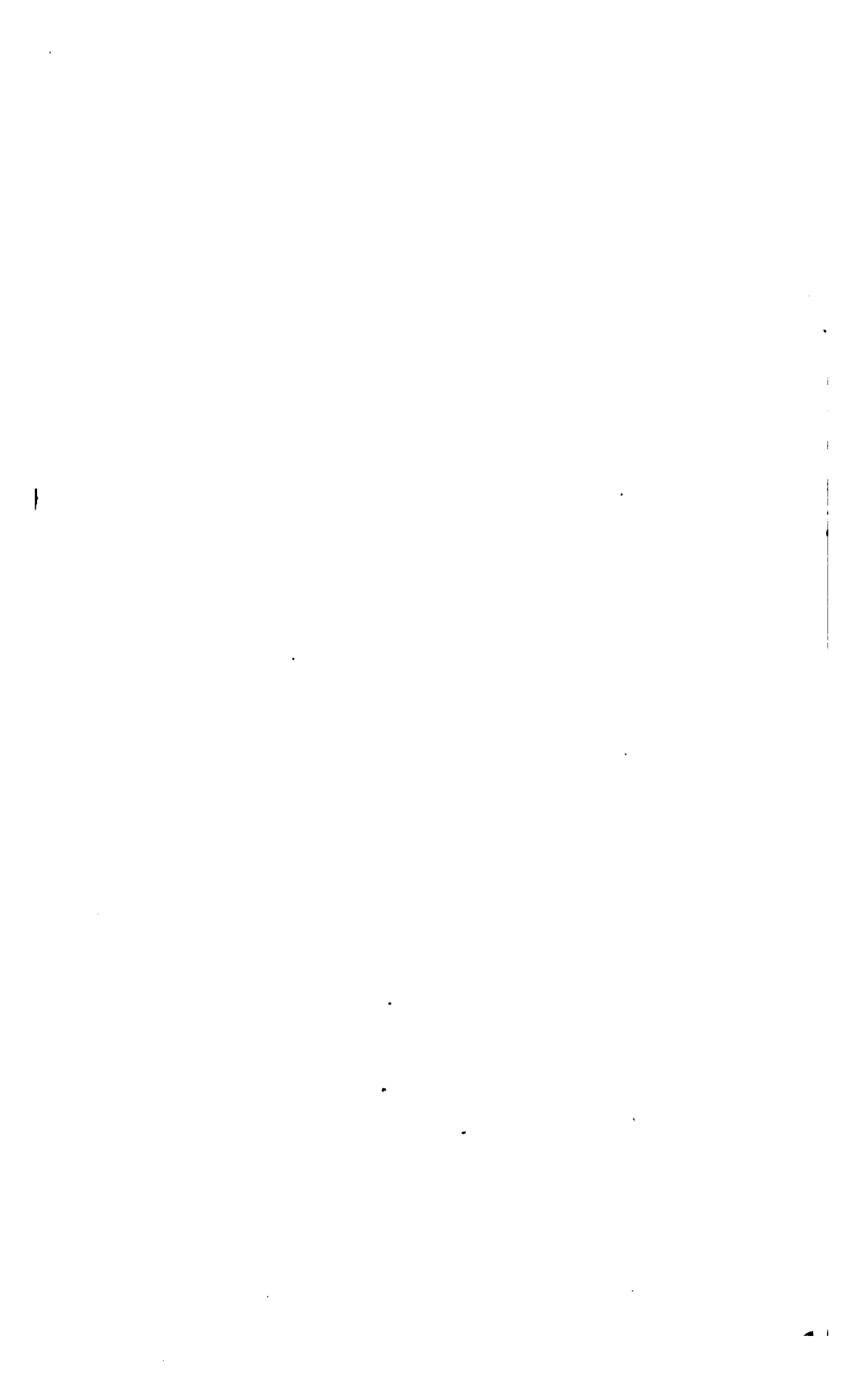
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